Province of
British Columbia

1989

# Report on the
# Commercial Tenancy Act

## LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

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# LAW REFORM COMMISSION OF BRITISH COLUMBIA

## REPORT ON THE COMMERCIAL TENANCY ACT

LRC 108

December 1989

90-03066/

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**Canadian Cataloguing in Publication Data**

Law Reform Commission of British Columbia.
Report on the Commercial Tenancy Act

(LRC, ISSN 0843-6053 ; 108)

Includes bibliographical references.
ISBN 0-7718-8908-9

1. British Columbia. Commercial Tenancy Act.
2. Landlord and tenant - British Columbia. I. Title.
II. Series: Law Reform Commission of British Columbia.
LRC ; 108.

KEB224.A72L38 1989 346.71104'34 C90-092028-9

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TO THE HONOURABLE BUD SMITH, Q.C.
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA:

The Law Reform Commission of British Columbia has the honour to present the following:

# REPORT ON

# THE

# COMMERCIAL TENANCY ACT

This Report is concerned with an examination of the law applicable to commercial tenancies. Its focus is the *Commercial Tenancy Act*. A study of the Act raises a number of questions. Are all its provisions relevant to the needs of the late 20th century? Are there anachronisms that should be eliminated? Of those provisions that remain relevant, which should be expressed in more modern and accessible language? Are there aspects of the law, on which the Act is silent, that seem to call for statutory intervention to clarify and modernize them? Should the provisions of other enactments that apply mainly to commercial tenancies be consolidated with the Act?

The Law Reform Commission's answer to these questions is embodied in draft legislation which would provide a new and modern *Commercial Tenancy Act*.

# CHAPTER I INTRODUCTION

## A. Landlord and Tenant Law

### 1. Generally

Few legal relationships are so familiar, and so imperfectly understood, as those that exist between landlord and tenant. The average individual, if asked to describe this relationship, would probably characterize it as an arrangement between the owner of property and another under which the latter is permitted to use the property for the payment of "rent." This captures the core idea but there is more to it than that.

A leading Canadian authority defines the relationship in the following terms:[1]

> At common law the relation of landlord and tenant is a contractual one, arising when one party, retaining in himself a reversion, permits another to have the exclusive possession of a corporeal hereditament, for some definite period or for a period which can be made definite by either party. The contract may be express or it may be implied by law. It is more than a mere contract, as it vests in the tenant taking possession an estate or interest in the land or premises demised.

This passage, while having the appearance of rigor, is not especially helpful as a starting point. Its value lies in clues it provides to the origins of this body of law. "Estate," "vest," "interest in land" and "corporeal hereditament" are all legal terms of art associated with land. Our landlord and tenant law is, in fact, firmly rooted in the English law of real property which we inherited when the Colony of British Columbia was founded.

### 2. Legislation

The English law of real property which we inherited was largely judge-made, on a case-by-case basis. But the process of developing it sometimes yielded unsatisfactory results and Parliament was called upon to change the law in relation to particular issues. Legislative intervention was frequent. One authority[2] lists no less than 88 English statutes, affecting the landlord and tenant relationship, which were apparently in force

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1. Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 1:1.
2. Woodfall, *Law of Landlord and Tenant* (10th ed., 1871).

when the Colony of British Columbia was founded in 1858. The earliest of those statutes dates back to 1266.[3]

In 1897, the more relevant provisions of the English statutes were consolidated and included in the Revised Statutes of British Columbia for that year as the *Landlord and Tenant Act*.[4] To these were added certain provisions drawn from similar legislation enacted in Ontario and Manitoba.[5] Subject only to minor amendments introduced over the past 90 years, the Act of 1897 remains in force as the *Commercial Tenancy Act*.[6]

As its title suggests, the *Commercial Tenancy Act* does not apply to all tenancies. The vast majority of tenancies, those that provide for housing and accommodation for individuals, are dealt with under other legislation: the *Residential Tenancy Act*. This latter piece of legislation and its origins are the subject of special comment below.[7]

The *Commercial Tenancy Act* and The *Residential Tenancy Act* still do not exhaust the list of enactments which touch on or define the rights and responsibilities of landlords and tenants. To them must be added provisions found in the *Law and Equity Act*,[8] the *Property Law Act*,[9] the *Rent Distress Act*,[10] the *Land Title Act*,[11] and the *Land Transfer Form Act*.[12]

### 3. Terminology

This body of law has its own distinct, and often confusing, vocabulary. There are, in fact, two parallel streams of terminology that may be employed to describe the relationship and the parties. One might speak of a "landlord" and a "tenant" whose relationship is embodied in a "tenancy agreement." One might speak, equally correctly, of a "lessor" and a "lessee" whose rights are embodied in a "lease." The terminology of these streams is frequently mingled. The word "demise" is also sometimes used interchangeably with "lease." There are also terms of

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3. 51 Henry 3, c. 4 (distress on beasts of the plough and on sheep).
4. R.S.B.C. 1897, c. 110.
5. *See* Appendix C which sets out the origin of each section of the *Commercial Tenancy Act*.
6. R.S.B.C. 1979 c. 54. The minor amendments were the addition of ss. 32 and 33 in 1924 and 1974 respectively. *See* Appendix C. The full text of the *Commercial Tenancy Act* is set out as Appendix A to this Report. Selected provisions of the other enactments referred to are set out as Appendix B.
7. *Residential Tenancy Act*, S.B.C. 1984, c. 15.
8. *Law and Equity Act*, R.S.B.C. 1979, c. 224.
9. *Property Law Act*, R.S.B.C. 1979, c. 340.
10. *Rent Distress Act*, R.S.B.C. 1979, c. 362.
11. *Land Title Act*, R.S.B.C. 1979, c. 219.
12. *Land Transfer Form Act*, R.S.B.C. 1979, c. 221.

art that describe various elements or refinements in this body of law. An example is the words used to identify what the parties have. The tenant's interest is called the "tenancy" and the landlord's interest is called the "reversion."

Derivations of these terms may also be used. One may, therefore, have a "sublease" or "underlease" (as opposed to a "principal lease") between a "sublessor" or "sublandlord" (as opposed to a "chief landlord") and a "subtenant" or "sublessee."

In this Report we adopt a consistent vocabulary centred on the "landlord," "tenant" and "tenancy agreement" stream of terminology.

### B. Residential Tenancies

The kind of landlord and tenant relationship most familiar to the average citizen is the one created to provide the tenant with living accommodation -- the residential tenancy. Until 1970, the law drew no distinction between residential tenancies and tenancies created for business or agricultural purposes. Both were governed by the common law and by the provisions of the *Landlord and Tenant Act*[13] which applied to tenancies of all kinds.

In 1970 a series of new provisions were added to the *Landlord and Tenant Act* that applied only to residential tenancies.[14] Further changes were introduced in 1974.[15] These amendments radically altered the legal character of the residential tenancy. One theme of these changes was to shift the way in which the relationship is characterized so principles of contract law apply in various circumstances. Other changes altered the institutional framework for enforcing rights in this context, introduced security of tenure into the periodic tenancy, and abolished the landlords' right of distress.

The 1974 amendments also resulted in a change in legislative distribution. Landlord and tenant matters were divided

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13. R.S.B.C. 1960, c. 207.
14. *Landlord and Tenant (Amendment) Act*, S.B.C. 1970, c. 18. These amendments paralleled similar legislation enacted in Ontario which implemented the recommendations made by the Ontario Law Reform Commission in its Interim Report of the Ontario Law Reform Commission on *Landlord and Tenant Law Applicable to Residential Tenancies* (1968).
15. *Landlord and Tenant Act*, S.B.C. 1974, c. 45. These changes reflected the recommendations made by the Law Reform Commission of British Columbia in *Report on Landlord and Tenant Relationships: Residential Tenancies* (LRC 13, 1973).

between two acts. All of the provisions applicable only to residential tenancies were enacted as the (now) *Residential Tenancy Act*.[16] The provisions that were contained in the pre-1970 *Landlord and Tenant Act* were retained as the (now) *Commercial Tenancy Act*.[17]

## C. The Commercial Tenancy Act: An Overview

The scope of the *Commercial Tenancy Act* is determined by the breadth of the concept of the commercial tenancy. This is not a concept that has a fixed definition. Broadly speaking, it means any tenancy that is not a tenancy of "residential premises" and the definition of that term set out in the *Residential Tenancy Act*[18] should be consulted in doubtful cases. The *Commercial Tenancy Act*, therefore, would govern a lease of premises in which the tenant was to carry on business as a retail or wholesale merchant or as a manufacturer. It would also govern a lease of land for agricultural purposes or one created in conjunction with a right to extract or exploit natural resources. Particular themes in the Act are described below.

### 1. Provisions Relating To Distress

The landlord has a right, known as "distress," to seize and sell his tenant's goods in satisfaction of arrears of rent. This may be done without recourse to the courts or legal process. The remedy is regulated principally by the *Rent Distress Act*, but certain sections of the *Commercial Tenancy Act* also touch on distress. These provisions are discussed in Chapter VII.

### 2. Procedure

A large group of provisions in the *Commercial Tenancy Act* are concerned with procedural issues. The Act provides 3 different summary procedures which may be invoked by a landlord to recover the possession of rented premises in various circumstances. These procedures all date from the last century and they have escaped the modernization and rationalization that

16. *Supra*, n. 7.
17. Further changes were made to the *Residential Tenancy Act* in 1984. *See Residential Tenancy Act*, S.B.C. 1984, c. 15.
18. *See* Appendix B. *See also* s. 2(2) of the *Residential Tenancy Act* which excludes from its application certain tenancies which would otherwise be governed by it. Those tenancies are probably governed by the *Commercial Tenancy Act*.

other aspects of civil procedure have received in recent years. Procedural issues are discussed in Chapter IX.

#### 3. Apportionment

Sections 11 to 14 are concerned with apportionment. The apportionment provisions purport to provide guidance as to the rights of parties when a tenancy ends before the rental period expires. These provisions are considered in Chapter VIII.

#### 4. Bankruptcy

When a tenant becomes bankrupt, special concerns arise. This event is frequently stipulated to be one which allows the landlord to terminate the tenancy. But to give full effect to such a stipulation would put the trustee in bankruptcy at a grave disadvantage. The trustee would be unable to deal effectively with the tenant's estate in the absence of special rights in relation to the tenancy. Section 32 gives the trustee special rights. The operation of this section is examined in Chapter VI.

#### 5. Parties

Over the life of a landlord and tenant relationship, the identity of either or of both of the parties may change. The landlord may wish to assign his interest (the reversion). The tenant may wish to assign his interest (the tenancy) or, alternatively, to create a subtenancy. What limits are placed on, and what rules apply to, such transactions? How far do the provisions of an agreement made between the original parties bind their successors in interest? These issues arise in a number of provisions which are discussed in Chapter IV.

### D. Some Initial Observations

It does not require a lengthy or intensive exposure to the *Commercial Tenancy Act* and the related enactments and rules of the common law to reach a provisional conclusion that we are not well-served by this body of law. The Act itself is a patchwork consisting of fragments drawn from individual statutes enacted sometimes centuries apart. It has few underlying themes which

might give it a coherent structure. This should not be surprising given its ad hoc character.

The patchwork character of the law in this area is also reflected in an irrational legislative distribution which has resulted in the enactment of a number of important and relevant measures in statutes other than the *Commercial Tenancy Act*.

Many of the concepts dealt with in the Act are archaic. Section 7, for example, provides:

> 7. Every person shall and may have the like remedy by distress and by impounding and selling the same, in cases of rentseck, rents of assize, and chief rents, as in case of rents reserved on lease, any law or usage to the contrary notwithstanding.

Terms such as "rentseck" and "rents of assize" convey nothing to the modern reader.

Other provisions, whatever their contemporary utility may be, are drafted in an extremely convoluted style which makes their substance virtually inaccessible. Section 10, for example, provides:

> 10. Where any tenant for life dies before or on the day on which any rent was reserved or made payable on any demise or lease of any land which determined on the death of the tenant for life, the personal representatives of the tenant for life shall and may recover from any undertenant or undertenants of the land if the tenant for life dies on the day on which the same was made payable, the whole, or if before such day then a proportion, of the rent according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

Formulations such as this are no credit to the statute book.

At bottom, the provisions of the Act reflect a society in which the agricultural tenancy is of greatest economic importance. At the time they were enacted, the typical tenancy might have been the lease of a farm, with a fixed rent payable on a yearly or half-yearly basis. Today the typical commercial tenancy is more likely to involve a lease of retail merchandising space in a shopping mall with rent payable at least monthly at a rate that is tied, in part, to the tenant's gross sales. The needs of landlords and tenants in British Columbia in the 1980s are far different than those that existed a century ago. A body of law which is blind to this change and remains static serves them, and society, badly.

While it would be an overstatement to describe reform of the law in this area as an urgent matter, one function of the Law Reform Commission is to "modernize and simplify the law."[19] A substantial revision of the *Commercial Tenancy Act* falls squarely within that statutory mandate.

## E. Approach and Aim of This Study

The aim of this project is to develop a new and modern *Commercial Tenancy Act*. This involves examining all the provisions of the current Act from a number of viewpoints including contemporary relevance and drafting. Provisions, or groups of provisions, that should be carried forward have been integrated into draft legislation that forms the core of Chapter X.

Related provisions contained in other enactments have received similar consideration and the desirability of their consolidation in a new *Commercial Tenancy Act* is also examined. Finally, attention is devoted to rationalizing and clarifying certain aspects of the law applicable to commercial tenancies which have not, hitherto, been the subject of legislation in this province. In this regard we have been guided by legislative developments in other jurisdictions and by difficulties and concerns which emerge from recent case law.

Provisional views on the issues which arise from such an examination were set out in our *Working Paper on the Commercial Tenancy Act*[20] which was issued by the Commission in July, 1988 as a consultative document. The Working Paper was distributed widely among interested persons and groups. The provisional views set out in the Working Paper have been thoroughly reviewed in the light of the response and comment it generated. Our final conclusions are those set out in this Report.

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19. *Law Reform Commission Act*, R.S.B.C. 1979, c. 225, s. 2.
20. Law Reform Commission of British Columbia, *Working Paper on the Commercial Tenancy Act* (WP 61, 1988), hereafter referred to as "the Working Paper."

## A. Formal Requirements

### 1. Background

The common law imposed no requirement that the creation of an interest in land which we would now characterize as a lease or a tenancy agreement be embodied in, or evidenced by, a written document. Until late in the 17th century any lease could be created orally.[1] This changed with the enactment of the *Statute of Frauds* in 1677 which required that leases of land for a term in excess of three years be evidenced in writing and signed.[2] The modern successor to the *Statute of Frauds* is section 54 of the *Law and Equity Act*.[3] The key parts of that section provide:

> **54.** (1) In this section "disposition" does not include
> (a) the creation, assignment or renunciation of an interest under a trust, or
> (b) a testamentary disposition.
>
> (2) This section does not apply to
> (a) a contract to grant a lease of land for a term of 3 years or less,
> (b) a grant of a lease of land for a term of 3 years or less, or
> (c) a guarantee or indemnity arising by operation of law or imposed by statute.
>
> (3) A contract respecting land or a disposition of land is not enforceable unless
> (a) there is, in a writing signed by the party to be charged or by his agent, both an indication that it has been made and a reasonable indication of the subject matter,
> (b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed his position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.
>
> (4) For the purposes of subsection (3)(b), an act of a party alleging a contract or disposition includes a payment or acceptance

1. Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 2:1:1.
2. 29 Car. 2, c. 3. *See* Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (LRC 33, 1977).
3. R.S.B.C. 1979, c. 224. S. 54 was added to the *Law and Equity Act* in 1985 and implemented the recommendations made in LRC 33, *ibid.*

by him or on his behalf of a deposit or part payment of a purchase price.

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

The requirements of section 54 are not onerous. The writing need only provide a "reasonable indication" of an agreement and its subject matter. Even where the writing requirement has not been met the enforceability of the agreement may be saved by evidence of conduct of a party or a change of position. The requirements of the original *Statute of Frauds* were much stricter.

Another strict formality that was part of our "received" English law concerned the form that writing must take. An act of 1845 required that any lease "required by law to be in writing" must be made by deed.[4] This has the effect of imposing an even more stringent set of formal requirements including the use of a seal.[5]

The statutory requirement that a lease be embodied in a deed has vanished from our law. The English legislation of 1845 is one of a number of Imperial acts which are expressly declared not to be in force in the province.[6] This is reinforced by section 16(1) of the *Property Law Act*[7] which provides:

**16.** (1) Subject to subsection (2), every instrument purporting to transfer, charge or otherwise deal with land or to release or otherwise deal with a charge, and every power of attorney under which the instrument is executed, may be executed without a seal.

Finally, the effect of section 5(2) of the same act should also be considered:

(2) A person who as landlord or intended landlord makes a lease or agreement for a lease, other than a lease or agreement for a term not exceeding 3 years where there is actual occupation under the lease or agreement, shall, unless the contrary is agreed in it, deliver an instrument creating the lease or agreement to the tenant or intended tenant in form registrable under the Land Title Act.

Three features of this provision call for comment. First, it does not make a written instrument essential to the validity or enfor-

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4. *Real Property Amendment Act*, 1845, 8 & 9 Vict., c. 106, s. 3.
5. Some aspects of the law in relation to deeds and the formalities attendant on their creation are discussed in Law Reform Commission of British Columbia, *Report on Deeds and Seals* (LRC 96, 1988).
6. *Law and Equity Act*, *supra*, n. 3, s. 3. Even before the inapplicability of the 1845 legislation was declared by statute it was held in *Horse & Carriage Inn Ltd.* v. *Baron*, (1975) 53 D.L.R. (3d) 426 (B.C.S.C.) that the requirement for a deed no longer applied in the province, it being inconsistent with local circumstances and legislation.
7. R.S.B.C. 1979, c. 340.

ceability of any lease that may be created. It merely imposes a duty on the landlord to deliver a written instrument in a specified form. If the landlord is in breach of that duty, the section would form the basis of an application by the tenant to court for an order compelling compliance.

The second feature is the form of the instrument. It must be in a form registrable under the *Land Title Act*. This incorporates, by reference, Parts 4 and 5 of that Act which deal with the form, attestation and proof of execution of instruments. Those parts do not call for the use of a deed.

The final feature is that the parties can, by agreement, abrogate the landlord's duty to provide a registrable instrument. This might be done where the landlord does not wish to see certain provisions of the tenancy agreement (such as the rental rate) become public knowledge, which would occur if the agreement were registered.

### 2. Commercial Tenancy Act: Section 9

It is against the background outlined above that section 9 of the *Commercial Tenancy Act* must be considered:

> **9.** (1) It is lawful for the landlord, where the agreement is not by deed, to recover by action in any court of competent jurisdiction a reasonable satisfaction for the land held, used or occupied by the defendant for the use and occupation thereof.
>
> (2) If at the trial of the action it appears that any rent has been reserved by a parol, demise, or any agreement (not being by deed), such rent may be the measure of the damages to be recovered by the plaintiff.

This provision continues to reflect a view that a valid tenancy cannot be created except through a deed. It is meant to provide relief to a landlord where a *de facto* tenancy had been created by less formal means. It allows a claim for rent to be made against the tenant in the form of an action for damages for use and occupation. Because a deed is no longer essential to the creation of a tenancy, its absence no longer bars a landlord's claim for rent and section 9 has become redundant.

### 3. Conclusion

The enactments which govern the formalities that must surround the creation of the landlord and tenant relationship

seem to work satisfactorily. We have only two suggestions to make.

First, section 9 of the *Commercial Tenancy Act* should not be carried forward into new legislation. The "evil" it was designed to remedy ceased to exist long ago and the need for the provision has vanished.

Second, section 5(2) of the *Property Law Act* might be relocated. As explained above, it places a duty on the landlord to provide a registrable instrument, where a tenancy agreement having a term of more that 3 years is created. This provision might, more logically, be located in legislation concerned only with landlord and tenant law.[8]

### B. *Interesse Termini*

At common law a tenant must actually enter the premises he has rented before his title is perfected and he can enjoy the full benefit of it.[9] This rule of law means that whether the term commences immediately, or at some future date, a tenant acquires no actual estate in the land until he takes possession. The expression "*interesse termini*" is used to describe the interest the tenant has before he takes possession. It is an interest which gives the would-be tenant only limited rights. In particular, because the tenant acquires no estate in the premises, he cannot enforce any rights that depend on the existence of an estate.[10]

In most Canadian jurisdictions, including British Columbia[11] the doctrine of *interesse termini* has been abolished with respect to residential tenancies. In Alberta it has been abolished for all tenancies.[12] The Ontario Law Reform Commission made the following observations:[13]

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8. This recommendation is implemented in s. 3(2) of the draft legislation in Chapter X. The *Residential Tenancy Act* is also amended in s. 46(1) to provide a cross-reference to this provision. *See* draft *Tenancy Laws Amendment Act*, s. 4. This will insure that the duty to provide a registrable instrument continues to apply in the case of longer term residential tenancies.
9. For a discussion of "*interesse termini*" *see* Rhodes, *supra*, n. 1, para. 3:10:1-4; Megarry and Wade, *The Law of Real Property* (1975, 4th ed.) 632-3.
10. In the Working Paper (at p. 110) we adopted the widely-held view that a tenant "cannot sue for possession -- only damages." One correspondent, in a lengthy and forceful submission, opined that we had overstated the position, at least so far as we seemed to suggest that a tenant cannot sue the landlord for specific performance.
11. *Residential Tenancy Act*, S.B.C. 1984, c. 15, s. 48(3).
12. *Landlord and Tenant Act*, R.S.A. 1980, c. L-6, s. 53(1). It has also been abolished in England. *See Law of Property Act, 1925*, c. 20., s. 149.
13. Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 61.

> The harm which is likely to be suffered by a tenant of non-residential premises as a result of the application of the doctrine of interesse termini is considerable and may well be greater than the harm suffered by a residential tenant. The damages which can be awarded to a tenant in such cases are inadequate, as they usually take into consideration only the difference between the rental value and the actual rent reserved. Special damages, such as loss of business profits, can only be awarded where they are found to be within the contemplation of the parties.
>
> In the view of the Commission, such factors as the location and layout of the rented premises are of such importance to the commercial tenant as to make an enforceable right to possession a fundamental requirement. It is recommended, therefore, that a tenant of non-residential premises should have the same rights before he takes possession as after. Accordingly, the doctrine of interesse termini should be abolished.

We agree with these views. It is our conclusion that, in principle, the doctrine of *interesse termini* should not apply to commercial tenancies.

But is legislation necessary to achieve that goal? It may be argued that the doctrine has already been abolished in British Columbia, either by design or inadvertence. Section 15 of the *Property Law Act*[14] provides:

> **15.** (1) Land may be transferred in freehold only by an instrument expressed to transfer the land, but it is not necessary to use the word grant or any other term of art.
>
> (2) A transfer of land may pass the possession or right to possession without actual entry.
>
> (3) This section is subject to the *Land Title Act*.

Subsection (2) seems broad enough to abolish the doctrine of *interesse termini*. On the other hand, the context in which that subsection appears suggests that the drafter of section 15 did not have tenancies in mind. This view is reinforced by the note to section 15 that appears in the *Land Title Practice Manual*:[15]

> This section is intended to put to rest any argument that the Land Registry Act did not abolish the ancient forms of conveyance; notably the ceremonial mode, not requiring an instrument known as livery of seisin.

While section 15(2) of the *Property Law Act* may have abolished *interesse termini* we believe it would be unsafe to rely on its having done so. Our draft legislation contains a specific provision directed to this end.[16]

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14. R.S.B.C. 1979, c. 340, s. 15 was first enacted in 1978.
15. P. 640.
16. *See* ss. 3(4), (5) of the draft legislation in Chapter X.

## C. The *Land Transfer Form Act*

A characteristic feature of legal documents dealing with property interests in 19th century England was their prolixity.[17] Aspects of particular transactions would be set out in painful detail. This prolixity was seen as a threat to efficient conveyancing and measures were introduced to discourage it.

These measures employed two different strategies. The first was to assign, to every document of a certain type, consequences that would flow from provisions of a kind usually included in a well-drafted instrument in any event.[18] The second strategy was the enactment of "short form" legislation which allowed the drafter to use short phrases and expressions which, in the legislation, were given a meaning set out at greater length.

The second strategy underlies the *Land Transfer Form Act*[19] which provides short form expressions in relation to mortgages, conveyances and leases. Those provisions of the Act that concern leases are set out in full in Appendix B to this Report. The core section provides:

> **5.** Where a lease of land made according to the form in Schedule 3, or any other lease of land expressed to be made under this Act, the Short Form of Leases Act or the Leaseholds Act or referring to any of them, contains any of the forms of words in column 1 of Schedule 4, and distinguished by any number in it, the lease has the same effect and is to be construed as if it contained the form of words in column 2 of Schedule 4, and distinguished by the same number as is annexed to the form of words used in that lease, but it is not necessary in the lease to insert that number.

Thus all that is required to invoke the Act is that a lease be expressed to be made pursuant to it (or a predecessor Act) and that it use one or more of the short form expressions specified.

For example, if a lease made pursuant to the Act sets out the words:

> Proviso for re-entry by the lessor on nonpayment of rent, or nonperformance of covenants.

they are given the same legal effect as if they said:

> Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for 15 days after any of the days on which the same ought to have been paid (al-

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17. One reason for this prolixity may be that solicitors were remunerated according to the number and length of documents produced.
18. This strategy is embodied in the *Trustee Act*, R.S.B.C. 1979, c. 414 and the (now repealed) *Land (Settled Estate) Act*, R.S.B.C. 1979, c. 215.
19. R.S.B.C. 1979, c. 221.

> though no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, or assigns, then and in either of such cases it shall be lawful for the said lessor, his heirs, executors, administrators, or assigns, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as of his or their former estate, anything herein contained to the contrary notwithstanding.

That clause is typical of much of the drafting of the various lease provisions in the Act. They have a rather musty feel which seems very much out-of-touch with the concerns of modern landlords and tenants. Three more examples will suffice:

> **4.** and also will from time to time, during the said term, keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new made, in a good and husbandlike manner, and at proper seasons of the year;
>
> **5.** and also will not, at any time during the said term, hew, fell, cut down, or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down, or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs or firewood, or for the purpose of clearance, as herein set forth;
>
> **6.** and also that the said lessee, his executors, administrators, and assigns, will every year in the said term paint all the outside woodwork and ironwork belonging to the said premises with 2 coats of proper oil colours, in a workmanlike manner;

Any attempt to modernize the relevant portions of the *Land Transfer Form Act* is beyond the scope of this project. In the Working Paper, it was indicated that we would welcome submissions on whether that would be an exercise worth undertaking as views on this question would be helpful when possible additions to our program are under consideration.

A majority of the responses to this inquiry supported the Commission's view that the Act embodies an approach whose time has come and gone. With the advent of modern word-processing equipment, the preparation of most commercial leases has become a routine matter. Leases can be tailored to the needs of the parties and to the needs of institutional landlords with great ease. So far as we are aware, reliance on the existence of the act in drafting the substantive provisions of a lease is declining in practice and may soon disappear.

## CHAPTER III

## TENANCY AGREEMENTS AND CONTRACT LAW

### A. Introduction

The classic view of the landlord and tenant relationship is that it centres on the transfer of an interest in land -- a transfer that occurs at the time the relationship is created. The creation of a tenancy for a specified term is, essentially, the purchase of time in the land. The law characterizes what is being purchased as an "estate" in the land. When the purchase price (known as rent) is to be paid is a matter for negotiation between the parties. They might, for example, agree that the rent is to be paid when the tenancy is created. More commonly, however, they agree that payment of the rent is to be deferred. Typically it will be divided into several instalments and paid periodically during the term of the tenancy.

This presents a picture that, to modern eyes, is somewhat misleading. For example:

> T leases certain premises from L. The term is for two years and the rent is payable in equal instalments of $1000 per month.

An intuitive view of this arrangement is that it operates like an executory contract under which both parties perform their obligations over the time it is in effect. As one party performs his obligation, the obligation of the other accumulates; thus for each month that L permits T to occupy the premises, T becomes obligated to pay one month's rent.

The intuitive view does not, however, accord with the classic view concerning the legal nature of a tenancy and of rent. This view sees the transaction as a sale by L to T of an "estate" which takes the form of time in the premises.[1] The premises are T's for two years. L has performed all his obligations simply by creating the estate and transferring it to T. For convenience the rent is payable in instalments, but in terms of whether or not L has "earned" it, the arrangement is little different than if the

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1. *Goldhar* v. *Universal Sections and Mouldings Ltd.*, (1962) 36 D.L.R. (2d) 450 (Ont. C.A.).

whole of the rent had been payable when the tenancy was created.

The classic view dictates that in many cases where the rights of landlord and tenant are in issue, disputes will be resolved according to the body of law which governs the transfer of interests in land rather that contract law. The results may be quite different and be contrary to the reasonable expectations of the parties.

### B. Recent Developments

Recent years have seen something of a retreat from the classic view of the tenancy. Legislatures have moved to declare the supremacy of contract law in relation to certain types of tenancy or with respect to particular issues. The courts have also taken a fresh look at the legal nature of the tenancy and displayed an increased willingness to apply the rules of contract law. The most important development in this regard has been the decision of the Supreme Court of Canada in *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*[2]

The *Highway Properties* case involved a tenant in a major shopping centre who had entered into a fifteen year tenancy agreement. Two years later the tenant vacated the premises in breach of a covenant in the agreement which required that the tenant carry on business continuously throughout the fifteen year term. The landlord terminated the tenancy agreement by resuming possession. He attempted to re-let the premises but was unable to find a new tenant. The landlord then sued for rental arrears and for prospective damages.

The claim for prospective damages was rejected both at trial and by the British Columbia Court of Appeal[3] on the basis that a landlord who accepted a termination of the tenancy was not entitled to damages for the loss of the benefits of the tenancy agreement over its unexpired term,[4] a holding which reflected the classic view of the tenancy agreement.

The Supreme Court of Canada adopted a different view. It rejected the traditional distinction drawn between tenancy

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2. *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*, (1971) 17 D.L.R. (3d) 710 (S.C.C.).
3. (1967) 60 W.W.R. 193 (S.C.), *aff'd.* (1968) 66 W.W.R. 705 (C.A.).
4. *See Goldhar* v. *Universal Sections and Mouldings Ltd.*, *supra*, n. 1.

agreements and ordinary contracts. It held that a breach of a tenancy agreement should give rise to the same remedies as are available for breach of contract. In the circumstances of the case, the landlord whose tenant is in default is entitled to terminate the contract and sue not only for damages and rental arrears accruing up to the date of termination, but also for prospective damages.

The Court stated that the realities of the modern tenancy agreement as an essentially commercial contract do not justify the continued importance of the estate element. In particular, the Court criticized the fact that a party to a tenancy agreement was not entitled to relief in circumstances that, in a purely contractual setting, would constitute repudiation and anticipatory breach. Although technically a tenancy agreement is executed once a tenant acquires possession of the premises, the fact that future rent is payable by instalments means that, functionally, this aspect of the tenancy agreement has an executory character which justifies a claim for prospective damages.[5]

The Court's conclusion leaves little doubt that the principles governing relief for breach of contract now apply to tenancy agreements:[6]

> Although it is correct to say that repudiation by the tenant gives the landlord at that time a choice between holding the tenant to the lease or terminating it ... [there is] no logic in a conclusion that, by electing to terminate, the landlord has limited the damages that he may then claim to the same scale that would result if he had elected to keep the lease alive.
>
> ....
>
> There are some general considerations that support [this] view.... It is no longer sensible to pretend that a commercial lease...is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land.

The final words are, potentially, applicable in a wide variety of circumstances where conflicting principles of contract and land law coexist. Where, then, has this development left the law?

One author has suggested that five differing conceptions of the lease may be identified for the purpose of analysis:[7]

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5. *Supra*, n. 2 at 716.
6. *Ibid.*, at 721.
7. Sustrik, "Highway Properties -- Look Both Ways Before Crossing," (1986) 24 Alta. L. Rev. 477, 481.

1. A leasehold interest is a conveyance in the classical or traditional sense, totally distinct from contractual doctrines and principles;

2. A lease is a conveyance in the traditional sense, subject to the addition of one "contractual" remedy that permits the landlord to accept the tenant's repudiation of the lease and, upon giving the appropriate notice, to sue the tenant for damages suffered as a result;

3. A lease is a conveyance, but the landlord can employ the full arsenal of contractual remedies to enforce its terms, either:

   (a) in addition to the traditional remedies for enforcement of a lease, or

   (b) in substitution for the traditional remedies

4. A lease is a conveyance in the sense that it operates to create an interest in land, but is subject to all principles of contractual law, insofar as those contractual principles do not conflict with the basic interest in land; or

5. A lease is purely a contract.

A review of the post-*Highway Properties* jurisprudence leads the author to a conclusion that the largest number of decisions fall into the third category.[8]

A recent, and very important, British Columbia decision which falls into the third category is that of the Court of Appeal in *Lehndorff Can. Pension Properties Ltd.* v. *Davis Management Ltd.*[9] The conduct of a landlord, in wrongfully withholding its consent to an assignment of the tenancy, was in issue. Both at trial and on appeal it was held that this entitled the tenant to treat the tenancy as terminated. But two different analytical approaches emerged which led to this conclusion.

At trial,[10] the rights of the parties were analyzed in terms of real property law and it was held that a "constructive eviction" of the tenant had occurred. On appeal, this line of analysis was rejected in favour of one which treated the rights of the parties as governed by the law of contract. The question was whether, in all the circumstances, the conduct of the landlord constituted a serious or fundamental breach which the tenant could regard as a repudiation of the tenancy agreement. This approach was sanctioned (if not demanded) by *Highway Properties*.

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8. *Ibid.*, at 492. He continues, "It is, however, difficult to determine whether these new contractual remedies are in addition to or substitution for the more traditional estate remedies."
9. (1989) 37 B.C.L.R. (2d) 306. One member of the Court may have gone beyond the third category. Locke J.A. stated: "I unhesitatingly adopt the view that all contractual doctrines and remedies apply to this lease."
10. (1987) 13 B.C.L.R. (2d) 367 (S.C.).

## C. Our Approach

The author quoted above concluded his analysis of the post-*Highway Properties* jurisprudence with the following observations:[11]

> It is submitted that the fourth category should be the goal for our courts. It is perhaps more sensible to acknowledge that a lease is a contract as well as a conveyance, not only with regard to the remedies available to redress a breach, but also as concerns the applicability of such doctrines as frustration.
>
> ...
>
> The concept of a lease being subject to all contractual doctrines, to the extent that they are not inconsistent with the basic interest in land created by the lease, could eliminate many of the uncertainties that presently surround this area...

We are in substantial agreement with these views as a statement of the goal of legal change. The issue we face is the role of legislation in achieving it. How, if at all, should a new *Commercial Tenancy Act* deal with the application of contractual principles to tenancy agreements?

One option is that the Act should be silent on this issue and continue to leave the development of the law on this question solely to the courts. We doubt that this option should be pursued. Almost 20 years have passed since the decision in *Highway Properties*. The law is still far from settled on many of the issues which arise from the case with no prospect of early improvement. Uncertainty of this kind cannot be desirable when important commercial interests are at stake. Legislative intervention, in some degree, is clearly required.

We believe that a new *Commercial Tenancy Act* should recognize and reinforce the recent tendency in the case law to emphasize the contractual elements of a tenancy agreement and to rely more heavily on the concepts of contract law in resolving differences between the parties. At the same time, legislation should not go so far as to call into question the fundamental legal character of a tenancy agreement as creating an interest in land. Achieving the proper balance calls for some caution.

Our approach is to focus on specific problems and to confine our recommendations to those areas in which the divergence of contract law from real property law leads to the most mischievous results. Two such areas are examined in this chapter and a

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11. *Supra*, n. 7 at 494.

separate chapter is devoted to claims for future rent -- the issue in the *Highway Properties* case. This will leave a large area in which the Act will not mandate a contractual solution to particular disputes. It will remain for the courts to consider the application of contract principles on an issue-by-issue basis.

## D. Interdependence of Mutual Covenants

### 1. Introduction

As pointed out above, the tenancy agreement has been regarded historically as creating an interest in land rather than as a contract. One issue on which the classic view of the relationship of landlord and tenant reaches a different result than in a purely contractual setting concerns the interrelationship of mutual covenants. In this context a "covenant" is no more than a promise by the landlord or the tenant that is embodied in a provision of the tenancy agreement.[12] For example, the tenant will covenant to pay rent, while the landlord will covenant that the tenant shall have "quiet enjoyment" of the premises.

A question arises as to the relationship between the covenants of the landlord and those of the tenant. Are they interdependent, in the sense that a failure by one party to perform his covenants will excuse the other party from performing his? Or will that failure give rise to a claim for damages only? The answer depends on whether the position is governed by the classic view of the tenancy agreement or by contractual principles. Below, we examine both results, starting with that yielded by the law of contract.

### 2. Contract Law

The obligations, or covenants, of parties to any contract may be "independent" or "dependent."[13] If the covenants are independent, a breach of a covenant by one party does not relieve the other party of his obligation to perform his own covenant; instead, it merely gives the second party a right of action in damages. Where the covenants are dependent, however, the obligation of each party to fulfill his covenants is dependent upon the performance of the covenants of the other party. A failure by one

12. In our draft legislation in Chapter X we do not use "covenant" for this purpose.
13. 9 Halsbury (4th ed.) 356, para. 515.

party to perform will excuse the other from his own obligation to perform.

Not all covenants in a contract will be dependent -- only those covenants which are "material." Generally speaking, a material covenant is one which goes to the very substance of the contract. In almost every contract there will be some covenants which are material, so their breach will relieve the innocent party of his obligation to perform his own covenants. One test of materiality has been put in the following terms:[14]

> Every synallagmatic contract contains in it the seeds of the problem: in what event will a party be relieved of his undertaking to do that which he has agreed to do but has not yet done?... The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings?

The underlying rationale is apparent: since parties to a contract enter into it for their mutual benefit, it would be unfair to compel an innocent party to provide benefits when a breach by the other party has prevented him from receiving any benefits.

### 3. Tenancy Agreements: The Classic View

The classic view is that covenants in a tenancy agreement are to be treated as independent rather than dependent.[15] The failure of a landlord or tenant to perform his covenants does not in general, therefore, excuse the other from the obligation to perform his own covenants. This means, for example, that if a landlord fails to provide heat[16] when he has covenanted to do so, the tenant may not withhold rent. The tenant remains obligated to pay rent even if the landlord's default prevents the tenant from using the property in the way which had been intended. The tenant's only remedy is an action for damages.

The example cited above concerned the inability of a tenant to withhold rent in the face of the landlord's default. The independence of covenants in tenancy agreements suggests that the same rule should apply when the tenant is in default of a materi-

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14. *Hong Kong Fir Shipping* v. *Kawasaki Kisen Kaisha*, [1962] 2 Q.B. 26, 65-66 *per* Lord Diplock.
15. *Goldhar* v. *Universal Sections and Mouldings Ltd.*, *supra*, n. 1 at 453.
16. *Johnston* v. *Givens*, [1941] 4 D.L.R. 634, 637 (Ont. C.A.).

al covenant. If a tenant fails to pay rent, the landlord should, presumably, still be obliged to continue to fulfill his covenant for "quiet enjoyment" of the premises, as well as any additional covenants he might have, such as for the provision of heat. In theory, he does, but in practice it does not work that way.

If the tenant fails to pay rent, the landlord almost invariably has a right to retake possession of the premises. He may do so under a "proviso for re-entry" in the tenancy agreement or by invoking one of the statutory procedures to regain possession for non-payment of rent.[17] The common law doctrine concerning the independence of mutual covenants in tenancy agreements is, therefore, very much a one-way street which overwhelmingly reinforces the legal position of the landlord and does little or nothing for the tenant.

How far the common law has moved away from the classic position is uncertain. Modern cases such as *Highway Properties*[18] evidence an increased willingness to treat commercial leases similarly to other contracts. A recent British Columbia case concerning the breach of a material term by a commercial tenant is *Pam-Cor Investments* v. *Friends and Neighbours Family Restaurant.*[19] The plaintiff had leased a restaurant to the defendant under an agreement which stipulated the restaurant was to be operated as a "Smitty's Pancake House." The defendant began operating it under the name "Friends and Neighbours Family Restaurant" instead. The landlord sought to terminate the tenancy.

The Court of Appeal held that the stipulation as to the business name was "the fundamental basis upon which the parties concluded the sale of the business and the lease of the premises"[20] and that the breach of this term relieved the plaintiff of its obligations. The issue was characterized as the tenant's entitlement to relief from forfeiture under the provisions of the *Law and Equity Act*[21] and the impact of his breach on that entitlement. The common law doctrine respecting the independence of mutual covenants in tenancy agreements was not referred to.

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17. *See* Chapter IX.
18. *Supra*, n. 2.
19. (1987) 12 B.C.L.R. (2d) 387 (C.A.).
20. *Ibid.*, at 395.
21. R.S.B.C. 1979, c. 224. The provisions respecting relief from forfeiture are discussed in Chapter VII.

### 4. Reform Of The General Rule: Residential Tenancies

The common law position respecting the independence of mutual covenants, so far as residential tenancies are concerned, has been largely altered by legislation. Most provinces now have legislation similar to section 49(1) of the *Residential Tenancy Act*.[22] It provides:[23]

> Subject to subsections (2) and (3) or to any other provision of this Act to the contrary, the common law rules respecting the effect of the breach of a material term by one party to a contract on the obligation to perform by the other party apply to a tenancy agreement.

This section represents a clear attempt to reverse the common law position respecting the independence of material covenants.[24]

### 5. The Ontario Law Reform Commission's Proposals

A general need to "remedy the imbalance of rights between landlords and tenants flowing from the independence of covenants in a tenancy agreement"[25] was pointed out by the Ontario Law Reform Commission in its *Report on Landlord and Tenant Law*. It recommended that section 89 of the Ontario *Landlord and Tenant Act* (which is virtually identical to section 49(1) of the British Columbia *Residential Tenancy Act*) should, with some amendments, be made applicable to both residential and non-residential tenancies.[26] In its amended form section 89 would provide that:[27]

> (a) except where otherwise provided in the Act, the common law rules of contract respecting the effect of a breach of a condition or a covenant by one party to a contract on the right to damages or injunctive relief, or on the obligation to perform by the other party, should apply to tenancy agreements;

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22. S.B.C. 1984, c. 15, s. 49(1).
23. In a supplementary attempt to avoid some of the problems relating to covenants ss. 6 and 8 of the Act impose a statutory obligation on residential landlords to continue to provide services, while s. 9 allows a tenant, whose landlord is in breach of a statutory obligation, to apply for an order that his rent be paid into court.
24. The extent to which provisions similar to s. 49(1) have actually succeeded in altering the common law is less clear. The Ontario cases construing a comparable section have not found that it confers on the tenant a clear right to withhold rent in response to the breach of a material covenant by the landlord. *See, e.g., Brahmsgate Investments Ltd.* v. *Finn*, [1973] 3 O.R. 188, 191 (Co. Ct.). In *Tucker* v. *Scott*, (1980) 22 R.P.R. 255 (Ont. Co. Ct.) a review of the decisions concerning the deduction of all, or part of, the rent by a tenant under the Ontario statute convinced the judge that the Act and the cases interpreting it were "far from clear" and that a tenant "may assume too great a risk in deducting rent where there is an apprehended breach of a landlord's duty to repair."
25. Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 123.
26. *Ibid.*, at 128.
27. *Ibid.*

(b) where one party commits a breach of a fundamental term of the tenancy agreement, the other party should have the right to apply by summary application to a judge for a declaration that the tenancy is terminated;

(c) where the landlord commits a breach of a fundamental term of the tenancy agreement, the tenant should have the additional right to apply by summary application to a judge for an abatement of rent; in the meanwhile, upon such a breach the tenant should have the right to withhold rent from the landlord, while remaining in possession of the rented premises, but should then be required to pay this money into court. The disposition of the money paid into court should be subject to any further order of the judge; and

(d) the exercise of the rights accorded to the parties under (b) and (c) should not preclude in appropriate cases the exercise of the rights accorded to them under (a).

## 6. Conclusions

The issues surrounding the independence of covenants in residential tenancy agreements were considered by this Commission in 1973 in *Report on Landlord and Tenant Relationships: Residential Tenancies*.[28] That Report generally endorsed the principle that material covenants in residential tenancy agreements should not be independent. The considerations which justify reform in that context are largely applicable to commercial tenancies as well.

First, the common law rule seems to favour only the interests of the landlord. In those areas where the common law doctrine might benefit the tenant, his position has been eroded by statute or by provisions included in most commercial tenancy agreements that preclude his reliance on it. Second, the common law doctrine is quickly becoming an anomaly as the courts increasingly apply contractual principles in resolving issues arising under tenancy agreements.

It is our conclusion that new legislation respecting commercial tenancies should explicitly adopt the rules of contract law in relation to the dependence of material covenants. We agree, in general, with the views of the Ontario Law Reform Commission and, with one exception, adopt their suggestions for reform as our own.

The exception concerns rent withholding by the tenant. We believe that a legal framework for rent withholding and diver-

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28. Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships: Residential Tenancies* (LRC 13, 1973).

sion, operating under the jurisdiction of the court, could and should be worked out somewhat more elaborately than appears in the passage quoted above. That being done, however, the statutory remedy should be the exclusive procedure available to the tenant in relation to rent withholding.

The Ontario recommendations suggest that the tenant should, in "appropriate cases," be able to withhold rent purely on a self-help basis. While there may be arguments in favour of this position, we believe it has a major disadvantage. It invites abuse by the unscrupulous (or desperate) tenant who might seize on any trivial default (real or imagined) by the landlord as an excuse to avoid paying rent when it is due. Restricting the tenant to a statutory remedy, which involves a court application, should eliminate any frivolous use of rent withholding.[29]

## E. Frustration of Contract

An agreement may become impossible to perform fully for a variety of reasons. Where that occurs, the law may or may not excuse one or both parties from further performance, so far as that is possible, or from liability for non-performance. Where the law does provide relief from the consequences of a supervening event which renders performance impossible, the agreement is said to be "frustrated" or "the doctrine of frustration" is said to apply.

The doctrine of frustration was the subject of one of the first Reports made by this Commission.[30] In it were identified four clearly established requirements that must be met before the doctrine applies:[31]

(1) A supervening event, the occurrence of which is not expressly provided for in the contract;

(2) The supervening event must not have been caused by the fault of either party to the contract;

(3) The supervening event must have resulted in a radical alteration in the obligations of the parties; and

(4) There must be more than just hardship, inconvenience, or material loss to the party seeking relief.

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29. *See* s. 4 and s. 10 of the draft legislation in Chapter X.
30. *Report on the Need for Frustrated Contracts Legislation in British Columbia* (LRC 3, 1971).
31. *Ibid.*, at 11.

The Report canvassed a number of cases in which the doctrine had been considered. The position of leases was singled out for special comment:[32]

> Whether or not the doctrine extends to leases has caused considerable controversy.... The problem turns on the nature of a lease which has both contractual and property aspects. Under the common law, a lease confers an interest in land. A tenant acquires what is called a nonfreehold estate. If he has rented a house for a year at a monthly rent and after a month the house burns down, the lease would not be regarded as frustrated and he would be responsible for the remaining rent in the absence of any agreement to the contrary. Although the house has been destroyed, the subject-matter of the contract, which is the interest in land, is said to be still in existence. If, however, the land disappeared (say, as a result of an earthquake or flood), it is thought that the lease would be frustrated.

The Report went on to recommend that the doctrine of frustration should apply to leases as should legislation implementing the other recommendations in that Report.

The recommendations made in that report were implemented through the enactment of the *Frustrated Contract Act*[33] and through the addition of section 33 to the *Commercial Tenancy Act*:

> **33.** The *Frustrated Contract Act* and the doctrine of frustration of contract apply to leases.

So far as we are aware, this provision has not been the subject of any reported cases.

Since the Commission's 1971 Report was issued, the common law has moved in the direction of accepting the lease as an arrangement to which the doctrine of frustration may apply.[34] We believe, however, an explicit legislative statement to that effect should be retained and, accordingly, our draft legislation carries forward section 33 of the current act.[35]

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32. *Ibid.*, at 16.
33. R.S.B.C. 1979, c. 144. The full text of the *Frustrated Contract Act* is set out in Appendix B.
34. *See National Carriers Ltd.* v. *Panalpina (Northern) Ltd.*, [1981] A.C. 675; *Turner* v. *Clark*, (1983) 129 A.P.R. 340 (N.B.C.A.).
35. In the Working Paper, at 113, we invited comment on a suggestion made by the Ontario Law Reform Commission in its 1976 Report, *supra*, n. 25 at 209, that the rules of general application respecting frustration should not apply to commercial tenancies and, instead, a special set of rules be developed. None of our correspondents endorsed this approach.

## CHAPTER IV PARTIES TO A TENANCY AGREEMENT

### A. Introduction

It is no novelty that the benefit or burden of a legal arrangement may move from one party to that arrangement to another person. The assignment of the right to be paid a debt is an obvious example, as is the shifting of the burden of paying that debt from the debtor to the debtor's estate on his death.

The landlord and tenant relationship can undergo a similar change of parties. Either may die during the term of a tenancy agreement. Either may wish to assign his interest in the property. It also may be open to the tenant to create a new species of interest, in the form of a subtenancy. The tenant then becomes a landlord *vis-a-vis* the subtenant but retains his original status *vis-a-vis* his own landlord.[1]

Acts and events which may create a change of parties, or introduce new parties, raise a number of questions. What acts or events are effective to create new relationships? How far may one party regulate the creation of new relationships by the other? Does the benefit and burden of each and every right and duty that existed between the original landlord and tenant continue between either of them and a new party? These are some of the questions addressed in this chapter.

### B. The Subtenancy

At first blush a subtenancy seems an odd sort of interest and an initial question is whether it continues to serve a useful function. The answer is clearly yes. There are a number of circumstances in which the tenant will wish to create a subtenancy rather than assign his interest. An assignment involves a disposition of the whole of the tenant's interest, both in physical size and duration. The creation of a subtenancy enables the tenant to carve out and dispose of a smaller interest. It also permits a degree of deviation from the terms of the original tenancy, something that cannot be done on an assignment.

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1. A certain amount of confusing terminology surrounds this kind of relationship. The subtenant is sometimes referred to as an "undertenant" who holds his interest by virtue of an "underlease." The lease to which the holder of the reversion is a party is called the "head lease." In the draft act in Chapter X we adopt a consistent vocabulary. *See* s. 8(1).

For example, a tenancy (the head tenancy) may be created with respect to 20,000 sq. ft. of office space for a term of 10 years at a rent of $25 per sq. ft. *per annum*. Part of that may be surplus to the immediate needs of the head tenant. The ability to create a subtenancy means that he can dispose of, say, half of the premises for 5 years. This preserves his right to reoccupy the sublet space in the future if he requires it. Two years into the tenancy he might wish to dispose of all the space for the remaining 8 years but discovers that the going rate for similar space is now $32. Disposing of the premises through a subtenancy enables him to take advantage of the increased value of the tenancy.

Where the tenant wishes to mortgage his interest, the usual form it takes is a "mortgage by way of sublease." This is advantageous from the perspective of the lender, since it is clear he will not become directly liable to the landlord with respect to the obligations in the tenancy agreement. A mortgage of the tenancy itself might be characterized as an assignment which creates such liability.

A persistent issue surrounding subtenancies is that of the rights and obligations of the subtenant when the head tenancy agreement ceases to confer rights on the tenant. This may occur, for example, where the tenant is in breach of the head tenancy agreement and the head landlord is justified in terminating it. The head tenancy may also cease to exist through the operation of rules of law relating to the surrender or merger of the tenant's interest.

### 1. Effect Of Surrender Or Merger Of Head Tenancy

#### *(a) Surrender and Merger Generally*

A surrender is simply a transfer by the tenant of his interest to his landlord. A merger occurs when both the reversion and the tenancy become vested in the same person. This may occur, for example, where the tenant purchases the reversion, where a third party purchases both the tenancy and the reversion or on a surrender:[2]

> Surrender and merger are often confounded. Every strict technical surrender is indeed attended with a merger of the estate surrendered; but merger may often take place where there is no surrender. Generally speaking, wherever an inferior estate and

2. Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 12:5:1.

the superior come together, merger takes place, although the superior may come to the inferior, and not, as in the case of surrender, the inferior to the superior.

The effect of a surrender or merger of the reversion is to destroy the privity of estate with the subtenant and release him of any obligations (including the obligation to pay rent) for the balance of his term.[3]

*(b) Property Law Act, Section 34*

In England the common law position described above was altered by legislation in 1845.[4] This legislation is substantially reproduced as section 34 of the *Property Law Act*:

> **34.** (1) Where a reversion expectant on a lease is surrendered or merged, the interest which as against the lessee for the time being confers the next vested right to the land shall be deemed the reversion for the purposes of preserving the same incidents and obligations as would have affected the original reversion had it not been surrendered or merged.
>
> (2) This section applies to surrenders or mergers effected before or after this Act comes into force.

In 1976 the Ontario Law Reform Commission, in its *Report on Landlord and Tenant Law*, commented on this provision:[5]

> The section preserves from destruction the benefit and burden of covenants by doing away with the common law rule which makes the enforcement of covenants against the tenant and the obligations of the landlord incident to the immediate reversion. The original landlord, having the next vested right to the land, becomes the holder of the reversion against the sub-tenant.

The Ontario Commission recommended the retention of this provision and we agree.[6] The substance of this provision should be moved from the *Property Law Act* and included in the new legislation which we recommend.[7]

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3. *See* Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 37; Rhodes, *ibid.*, at para. 12:2:9. The concept of "privity of estate" is briefly explained later in this Chapter.
4. *Real Property Act, 1845*, s. 9. *See now Law of Property Act, 1925*, c. 20, s. 139(1).
5. OLRC Report *supra*, n. 3 at 37.
6. *Ibid.*
7. This recommendation is implemented in s. 8(2)(b) of the draft legislation in Chapter X. The desirability of including this provision in commercial tenancy legislation is vividly illustrated by *250669 B.C. Ltd.* v. *Poplar Properties Ltd.*, (1988) 48 R.P.R. 283 (B.C.S.C.). The question arose as to the effect of a surrender of the head lease on a subtenancy and it was resolved wholly with reference to common law authorities. The existence of s. 34 of the *Property Law Act* was totally overlooked.

## 2. Surrender For Renewal: Section 8

Section 8 of the *Commercial Tenancy Act* concerns the effect of a surrender and renewal of the head tenancy on a subtenancy:

> **8.** (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new lease is, without a surrender of any of the underleases, as valid as if all the underleases derived from it had been likewise surrendered at or before the taking of such new lease.
>
> (2) Every person in whom any estate for life or lives, or for years, is from time to time vested by virtue of the new lease, and his personal representatives, are entitled to the rents, covenants and duties, and shall have like remedy for recovery thereof, and underlessees shall hold and enjoy the land in the respective underleases comprised as if the original leases out of which the respective underleases are derived had been still kept on foot and continued.
>
> (3) The chief landlord shall have and is entitled to such and the same remedy, by distress or entry in and on the land comprised in the underlease, for the rents and duties reserved by the new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as he would have had in case the former lease had been still continued, or as he would have had in case the respective underlease had been renewed under the new principal lease.

Provisions comparable to subsections (1) and (2) were also enacted in Ontario.[8] The background against which they operate was explained in the Ontario Report:[9]

> Under the common law, if a tenant surrendered his term to the landlord, he could no longer enforce a claim for rent or breach of covenant against the sub-tenant. Early statutory provisions, however, enabled a tenant to surrender his tenancy agreement for the purpose of taking a new agreement without a surrender of any sub-tenancy agreement and to retain any remedies he might have for recovery of rent and breaches of "covenants and duties."

The Report then quoted the legislation and continued:[10]

> Under the foregoing section, the new tenancy agreement becomes the reversion immediately expectant on the termination of the sub-tenancy agreement, the tenant of the new agreement having the same right to rent and performance of covenants as the former reversioner. The sub-tenant is given corresponding rights against the new tenant.

The Ontario Law Reform Commission recommended the retention of these provisions, recast in somewhat more modern language.[11] We agree that section 8, despite its outwardly antiquat-

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8. *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 63.
9. *Supra*, n. 3 at 38.
10. *Ibid.*
11. *Ibid.*, at 39. The legislative model suggested was the English *Law of Property Act, 1925*, c. 20, s. 150.

ed character, continues to serve a useful function. Its substance should be carried forward into new legislation.[12]

### 3. Termination Of The Head Tenancy

It was a curiosity of the common law that the subtenant was left in a highly favourable legal position if the head tenancy ceased to exist, through the operation of the law in relation to surrender or merger, and the intermediate tenancy disappeared. Equally curious was the position of the subtenant when the intermediate tenancy disappeared through a forfeiture under the head tenancy. Here the position was highly unfavourable. At common law the re-entry of the head landlord on a forfeiture caused the rights of the subtenant to disappear entirely.[13]

Statutory relief for the subtenant was provided in England by section 4 of the *Conveyancing and Law of Property Act, 1892*.[14] Similar provisions were adopted in a number of Canadian jurisdictions.[15] Section 21 of The *Landlord and Tenant Act* of Ontario is typical:[16]

> **21.** Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso or stipulation in a lease, the court, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action or summary application to a judge of the Supreme Court brought by such person for that purpose, may make an order vesting for the whole term of the lease or any less term the property comprised in the lease, or any part thereof, in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rents, costs, expenses, damages, compensation, giving security or otherwise as the court in the circumstances of each case thinks fit; but in no case is any such under-lessee entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

This provision creates a mechanism which permits a subtenant, in essence, to acquire his own landlord's interest and thus avoid the loss of his tenancy that would otherwise occur. British Columbia has no enactment which provides comparable relief.

In the Working Paper we suggested that a power in the court to grant relief to the subtenant in these circumstances

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12. This recommendation is implemented in s. 8(2)(a) of the draft legislation in Chapter X.
13. Rhodes, *supra*, n. 2, para. 12:11:8 citing *Smith* v. *Great Western Ry.*, (1877) 3 A.C. 165 (H.L.).
14. C. 13.
15. *See* Rhodes, *supra*, n. 2, para. 12:11:8.
16. *Supra*, n. 8.

would be a useful feature of a new *Commercial Tenancy Act*. The majority of our correspondents agreed with this view although some did express concern respecting one aspect of its operation. It was thought that such a power might be exercised in circumstances where the continued existence of the former subtenancy would render the forfeited tenancy unmarketable, or of significantly diminished value, when the landlord seeks to relet it. We doubt that the court would grant relief in these circumstances. England and Ontario have almost a century of experience with this kind of provision and we have discovered nothing in their experience which lends weight to this concern. We therefore adhere to the view set out in the Working Paper.

There is one aspect of the Ontario provision that calls for clarification. Under that provision it is not clear whether the power of the court to grant relief is confined to the situation where the head landlord has commenced proceedings. We believe it should not be. It should be open to the subtenant to apply for relief at any time after the head landlord has asserted that the head tenancy is forfeited, whether of not a proceeding has been commenced.[17]

## C. Assignments

### 1. Assignment Of The Landlord's Interest

For reasons that can only be explained in terms of the history of English land law and feudal tenures, the assignment by a landlord of his reversionary interest in property was not effective unless the tenant agreed to accept the assignee as his new landlord.[18] The technical term for acceptance of a new landlord is "attornment." The common law rule stated above was altered in 1705 by what is now section 14 of the *Commercial Tenancy Act*:

> All grants and conveyances heretofore or hereafter made of any real estate or rents, or of the reversion or remainder of any land, are good and effectual without any attornment of any tenant of any such land out of which such rent shall be issuing, or of the particular tenants on whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made; but no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor,

17. This recommendation is implemented in s. 8(3) of the draft legislation in Chapter X.
18. The rule is said to rest on the abolition of subinfeudation by the Statute *Quia Emptores* (1289-90) 18 Ed. I. *See* Woodfall, *Law of Landlord and Tenant* (10th ed., 1871) 212.

or by breach of any condition for nonpayment of rent, before the notice is given to him of such grant by the grantee.

A comparable provision was considered in the Ontario Report. It was recommended that it be retained in somewhat more modern language.[19]

Section 14 performs two functions. First, it reverses the common law position respecting the necessity of the tenant's attornment to an assignee of the landlord's reversion. Second, it protects the tenant who, without notice of the assignment, continues to pay his rent to the original landlord. We agree that the second function of section 14 should be preserved. We doubt, however, whether it is necessary to preserve the first. It seems extremely unlikely that, on the transfer of, say, a large office building, a modern court would limit the rights of the new owner by reason only that all the tenants had not "attorned" to him.

In any event, later in this Chapter we recommend that there be a general provision stipulating that all benefits and burdens arising under a tenancy agreement should pass on an assignment.[20] We believe that this should be sufficient to displace the common law rule respecting attornment, and no special provision such as section 14 of the current Act is necessary.

### 2. Assignment By Tenant

#### *(a) Generally*

While the common law required the tenant's assent to a transfer of the reversion by his landlord, the law places no corresponding inhibition on the tenant who wishes to assign his interest to another party. The general rule is that, in the absence of an express agreement to the contrary, a tenant may dispose of his interest as and to whom he wishes.[21]

#### *(b) Requirement of Landlord's Consent*

The freedom which the law gives the tenant to assign (and to sublet) his interest significantly weakens the legal position of landlords. The fact that this freedom can be removed by express agreement has led to the almost universal practice of including in tenancy agreements one or more clauses providing that the

19. *Supra*, n. 3 at 42.
20. This recommendation is implemented in s. 7(1) of the draft legislation in Chapter X.
21. Rhodes, *supra*, n. 2, para. 15:3.

tenant will not assign or sublet his interest without the leave of the landlord. Typical clauses may be found in the "leases" portion of the *Land Transfer Form Act*:[22]

**And will not assign without leave**

11. And also that the said lessee, his executors, administrators, or assigns, shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed, procure the said premises, or any of them, or the term hereby granted, to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said lessor, his heirs, executors, administrators, or assigns, first had and obtained.

**And will not sublet without leave**

12. And also that the said lessee, his executors, administrators, and assigns, shall not, nor will, during the said term, sublet the said premises hereby granted, or any part thereof, to any person or persons without the consent in writing of the said lessor, his heirs, executors, administrators, or assigns, first had and obtained.

Clauses such as these perform a legitimate function. The landlord has an interest in seeing that any successor in interest to the tenant is financially responsible. He wants to ensure that a new tenant will not result in any change of use which is undesirable per se, or which may put the landlord in violation of obligations owed to other tenants (such as where one tenant has received the exclusive right to carry on a particular type of business in a shopping centre through the landlord's promise not to let to any other tenant carry on such a business). The landlord should have a say in who should or should not become his tenant or occupy the premises as a subtenant.[23] Legal issues can arise, however, both when consent is granted and when it is withheld.

*(i) Consent Granted*

The common law penalized the landlord who wished to accommodate his tenant by consenting to an assignment or a subletting. The difficulty lay in a rule that consent, once given by the landlord for a particular transaction, thereafter freed the tenant to enter into further transactions without consent. Thus a consent to the creation of a subtenancy to a particular subtenant gave the tenant under the head tenancy carte blanche to create subsequent subtenancies without reference to the wishes of the

22. R.S.B.C. 1979, c. 221. Questions can arise as to what constitutes an assignment. In *Crescent Leaseholds Ltd.* v. *Gerhard Horn Investments*, (1982) 19 Sask. R. 391 (Q.B.), the court held that the amalgamation of two companies which resulted in the new entity taking over a lease was an assignment.

23. For an indication of the procedures a landlord might adopt in considering a request for his consent to an assignment or the creation of a subtenancy, *see* text at note 40 *infra*.

landlord. This was known as the rule in *Dumpor's Case*.[24] The rule has been modified by section 25 of the *Law and Equity Act*:[25]

> **25.** Where a licence to do an act which without that licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease has at any time after March 25, 1881, been given or is given to any lessee or his assigns, the licence, unless otherwise expressed, extends only to the permission actually given, or to a specific breach of a proviso or covenant made or to be made, or to the actual assignment, underlease or other matter specially authorized to be done, but not so as to prevent a proceeding for a subsequent breach, unless otherwise specified in the licence. All rights under covenants and powers of forfeiture and re-entry in the lease remain in full force and are available against a subsequent breach of covenant or condition, assignment, underlease or other matter not specially authorized or made unpunishable by the licence, in the same manner as if no licence had been given. The condition or right of re-entry is and remains in all respects as if the licence had not been given, except for the particular matter authorized to be done.

The effect of this provision is to confine a landlord's consent or waiver to the instance and purpose for which it was given and to prevent it receiving any larger effect.

There is no question that the substance of section 25 should be retained. We believe two changes should be made. First, the language of the provision should be substantially revised and modernized. Second, it should be relocated from the *Law and Equity Act* into a new *Commercial Tenancy Act*.[26]

*(ii) Consent Withheld*

*(a) A Duty to Act Reasonably*

Standard lease clauses 11 and 12 from the *Land Transfer Form Act* do not purport to set out the basis on which a landlord's right to grant or refuse his consent to an assignment or a subtenancy is to be exercised. This creates a potential for arbitrary, oppressive or unfair conduct by the landlord toward the tenant. Instead of withholding his consent for some legitimate business or economic reason, he may do so for reasons that are quite improper and unconnected with the tenancy.

To guard against this possibility, some tenants bargain for, and get, a proviso in their tenancy agreement that the landlord's consent will not be withheld "wilfully," "arbitrarily," "vexatious-

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24. (1603) 4 Co. Rep. 119, 76 E.R. 1110 (K.B.).
25. R.S.B.C. 1979, c. 224.
26. This recommendation is implemented in s. 9(7) of the draft legislation in Chapter X.

ly" or "unreasonably." In many Canadian jurisdictions such a proviso is implied by statute.[27] Section 23(1) of the Ontario legislation is typical:[28]

> **23.** (1) In every lease made after the 1st day of September, 1911, containing a covenant, condition or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that such licence or consent is not to be unreasonably withheld.

A similar principle is embodied in section 12 of the British Columbia *Residential Tenancy Act*:[29]

> **12.** (1) A tenant may assign or sublet his interest in a tenancy agreement with the consent of the landlord.
>
> (2) Where a tenancy agreement
>
> (a) has a fixed term of 6 months or more, or
>
> (b) is in respect of a mobile home pad...,
>
> the landlord shall not arbitrarily or unreasonably withhold his consent to assign or sublet the tenant's interest in the tenancy agreement.

A good case exists for extending this important protection to all tenants, as is done in most other provinces.

### *(b) Consequences of a Breach of the Duty*

What is the result when the landlord unreasonably withholds his consent to an assignment or a subtenancy? There are a number of possibilities. First, the tenant might complete his transaction and raise the unreasonableness of the refusal as a defence should the landlord assert a claim for relief, alleging that the transaction constitutes a breach of the tenancy agreement. In practice this course may not always be available. The active cooperation of the head landlord may be necessary to give the prospective subtenant/assignee access to the premises. The subtenant/assignee would be understandably reluctant to take over a tenancy that may be of dubious validity, given the possibility that a court might ultimately hold that the head landlord acted properly in refusing consent.

An alternative would be for the tenant to treat the unreasonable refusal of consent by the landlord as a repudiation of the tenancy agreement. This would allow the tenant to treat all his

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27. *See* Rhodes, *supra*, n. 2, para. 15:5:7.
28. *Supra*, n. 8.
29. S.B.C. 1984, c. 15.

obligations under the agreement as at an end. In effect, the tenant would be relieved of any obligation to pay rent for the balance of the term of the tenancy (assuming the tenant has given up possession).

The tenant need not, however, treat the unreasonable refusal as a repudiation. Instead the tenant might affirm the tenancy agreement and commence a proceeding for a declaration that the landlord's refusal is unreasonable. Such a proceeding might be coupled with a claim against the landlord for damages for his conduct.

To what extent are these courses of conduct open to the tenant? The current law is not clear beyond doubt. Historically, the tenant could not recover damages from the landlord in these circumstances. More recently this proposition has been questioned.[30] The general result of an unreasonable refusal seems to be that the tenant is released from the obligation to obtain the landlord's consent and is at liberty to assign without it. The court will declare the tenant's right to do so.[31]

The right of the tenant to treat the refusal as a repudiation was considered in a recent case by the British Columbia Court of Appeal. *Lehndorff Can. Pension Properties Ltd.* v. *Davis Management Ltd.*[32] The case is instructive both for the law it purports to apply and as an illustration of the kind of fact pattern that can give rise to a disputed refusal.

In this case, Davis (the tenant) was the occupant of a block of space in an older office building owned by Lehndorff (the landlord) under a lease that had some time to run. Davis had arranged to acquire office space in a new building owned by a different landlord (Park). As an added inducement to this relocation Park offered to take an assignment of the Lehndorff lease so the burden of paying future rent under that lease would fall on Park. That lease contained a provision that the landlord's consent to an assignment would not be unreasonably refused where the character of the proposed assignee and the proposed use of the premises were satisfactory.

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30. *See generally* the discussion in Rhodes, *supra*, n. 2, para. 15:5:1. A right to damages for the unreasonable withholding of consent was held to exist in *Cudmore* v. *Petro Canada Inc.*, [1986] 4 W.W.R. 38 (B.C.S.C.).
31. Rhodes, *ibid.*, at 15:5.
32. 1989) 37 B.C.L.R. (2d) 306, *aff'g.* (1987) 13 B.C.L.R. (2d) 367 (S.C.).

Lehndorff did refuse its consent. The reason for this refusal, it was found, was that Lehndorff was aware that Park would treat the lease as a "loss cutting operation." Park would likely sublet the premises at a rate that would undercut the price at which Lehndorff wished to let other vacant space in the same building. It was held that Lehndorff's consent to the assignment had been improperly refused[33] which constituted a repudiation of the lease. This relieved Davis (and consequently Park) of any further obligation to pay almost $2.5 million in future rent under the lease.

*(c) Reform*

Reform in this area would seem to raise four issues. The first concerns the case where the tenancy agreement provides that the landlord's consent to a transfer is necessary but it contains nothing to require that the consent not be unreasonably refused. Should such a requirement be imposed on the landlord by operation of law?

On this issue we have little doubt. British Columbia law is badly out of step with that which prevails in the rest of Canada. Where the consent requirement is not tempered by the need for reasonable behavior it can become an instrument for unfair and oppressive conduct of a kind that the law should not tolerate. It is, therefore, our conclusion that the new Act should contain provisions which prevent a landlord from refusing, unreasonably, to consent to an assignment of the tenant's interest or the creation of a subtenancy.[34]

The second issue concerns the legal technique which should be adopted to achieve this goal. There are two possible approaches. These were considered by the (English) Law Commission in its *Report on Leasehold Conveyancing*:[35]

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33. There was some difference among the justices of the Court of Appeal as to the relationship of the reason for refusal to the relevant provision of the tenancy agreement. Locke and Toy J.J.A. (and also Finch J., the trial judge) held that the provision was exhaustive of the grounds on which the landlord could refuse consent and Lehndorff's true motive for doing so was not among them. Locke J.A. suggests, however, that if there had been a standard general clause respecting the withholding of consent, and if the landlord had proceeded in good faith, he might have resisted the assignment. Carrothers J.A. held that the provision was not exhaustive and that other grounds might also justify refusing consent to the assignment so long as the landlord acts reasonably. In this case, however the landlord was not acting reasonably.

34. While *Lehndorff* is the most recent British Columbia authority on what constitutes a reasonable or unreasonable withholding of consent by a landlord, there is a large body of writing in this question in Canada and England. *See, e.g.*, Schein, "Assignment and Subletting -- The Landlord's consent: Practice and Procedure under Section 23 of the *Landlord and Tenant Act*," (1989) 10 Adv. Q. 238; Wilkinson, "Unreasonably Withholding Consent to Sub-let," (1989) 139 New L.J. 416.

35. Law Com. No. 161, 1987 at 2.

> [T]he landlord should be under an inescapable obligation, for breach of which he is liable...not unreasonably to withhold... consent.... We have considered whether a statutory covenant should be implied into every lease, or whether a statutory duty should be imposed on the landlord. We have decided to recommend the latter course. This decision was largely influenced by our consideration of who should be liable.
>
> If a statutory covenant were to be implied then by virtue of privity of contract, a landlord would remain liable even after assignment of the reversion. We do not think it right that liability should continue in this way. Imposing a statutory duty avoids this problem.
>
> ...
>
> The effect of creating a statutory duty rather than a statutory covenant is that the landlord's liability will be tortious rather than contractual. We do not think that this is likely to make any major difference. Although there are still certain significant differences between the rules for measuring damages for breach of contract and tortious damages, they are unlikely to arise often in this context.

The rejection or adoption of this approach in a British Columbia context depends on the view one takes of the consequences that should flow from an unreasonable refusal to consent to a transfer. It seems clear that the English Law Commission envisaged damages as the principal remedy of the injured tenant. The possibility that such a refusal might entitle the tenant to treat the tenancy as at an end (or that the tenant might wish to) is not considered. This, undoubtedly, is a reflection of the quite different patterns of landholding that exist in England.

Treating the landlord's conduct as a repudiation of the tenancy agreement can, however, only arise where the obligation on the landlord is to be found in the agreement itself, either as a term expressly agreed to by the parties, or one implied by law. It is difficult to see how the breach of a statutory duty could lead to the same consequences.

Adopting the approach of the Law Commission would, therefore, result in confining the remedy of the tenant to damages. We can see no policy which compels the adoption of a "damages only" approach and to do so would, we believe, represent an undesirable departure from the general trend of assimilating rights and obligations arising under tenancy agreements to the law of contract. This trend was strongly endorsed, in this context, by our Court of Appeal in *Lehndorff*[36] and a "damages only" approach is wholly inconsistent with the result reached in that

36. *Supra*, n. 32.

case. We favour a position which permits the courts to apply contractual principles.

It follows that we would prefer to see the obligation on the landlord, not to refuse unreasonably his consent to a transfer, imposed by means of a provision which is deemed to be a term of the tenancy agreement. Our draft Act reflects this view[37] and includes a provision which clarifies the jurisdiction of the court to declare that a landlord's consent has been unreasonably withheld.[38] It also provides that the parties may agree as to the standards by which the reasonableness of the landlord's conduct is to be measured.[39]

A third issue concerns the possibility that the landlord may wish to levy a charge for consenting to an assignment or subletting by his tenant. It should be noted that the process of rationally assessing an application for consent may require the expenditure of time, effort and expense by the landlord. The procedures that a landlord might adopt in considering an application for consent were described in a recent judgment:[40]

> The Defendant...controls a very large amount of real estate in Vancouver and elsewhere in British Columbia. This being the case it was not unreasonable for it to establish certain procedures for its employees to be guided by in processing requests such as that submitted by the Plaintiffs. These guidelines included the requirements that when a request for the consent of the Defendant to a sub-lease was received and before it was forwarded to management for consideration checks should be conducted on the proposed sub-tenant. These checks were to include:
>
> 1. Inquiries into the nature of the proposed sub-tenant's business.
> 2. Credit references of sub-tenant.
> 3. Business history of sub-tenant.
> 4. Arrangements for insurance coverage.
>
> After all the required information was collected in respect of an intended sub-tenant, approval of the proposed sub-tenancy might or might not be recommended to management who would then make the final decision.

We suspect that these are typical of the procedures followed by major landlords in deciding whether consent should be granted. None of the procedures or inquiries described seem unreasonable, nor does it seem unreasonable that the landlord should

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37. This recommendation is implemented in s. 9(2) of the draft legislation in Chapter X.
38. *See* s. 14(c)(i).
39. *See* s. 9(3).
40. *Munro* v. *Project 200 Investments Ltd.*, [1987] B.C.D. Civ. 2354-02 (S.C.).

wish to pass their cost along to the tenant whose request invoked them.

The possibility of a charge by the landlord raises two concerns. The first is that the landlord may not confine his demands to amounts that are reasonably related to investigating and processing the tenant's request. The circumstances may make the landlord's consent so crucial to the tenant that the landlord may make demands that border on extortion.

It might be argued that the answer to the first concern lies in the way in which the proviso, deemed to be part of the tenancy agreement, is framed. So long as it is aimed at prohibiting "unreasonable refusal" the tenant will receive a measure of protection. The conduct of the landlord who demands an exorbitant fee for his consent is so manifestly unreasonable that the tenant should have available almost all the remedies discussed above. Should the position of the tenant be reinforced through a more specific provision?

The second concern lies at the other end of the spectrum. If the "no unreasonable refusal" standard is enshrined in statute, is it possible that the courts might characterize the attempt by a landlord to levy any charge as being unreasonable? In other words, should legislation explicitly provide for a reasonable charge by the landlord in order to preserve his rights?

In Ontario, both of these concerns have been addressed in the context of residential tenancies. Section 91 of the *Landlord and Tenant Act*[41] restates the right of the tenant to assign or sublet, requires that the landlord's consent to either not be unreasonably withheld and in subsection(4) provides that:

> (4) A landlord shall not make any charge for giving his consent referred to in subsection (3), except his reasonable expenses incurred thereby.

This seems to embody a statement of the legal position of the parties which should give comfort to both. We believe that new legislation should contain a similar provision.[42]

The fourth and final issue was raised by one of our correspondents in response to the Working Paper. Is it possible for a tenancy agreement to prohibit any assignment or subletting by

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41. *Supra*, n. 8.
42. This recommendation is implemented in s. 9(4) of the draft legislation in Chapter X.

the tenant?[43] Our correspondent pointed out that such a prohibition, if effective, would permit the landlord to engage in the kind of arbitrary conduct sought to be eliminated by our recommendation for an implied provision respecting "unreasonable refusal." This is an issue on which, we believe, the *Commercial Tenancy Act* should speak clearly -- any purported prohibition of this kind should be void and unenforceable.[44]

## D. By, and Against Whom, is a Tenancy Agreement Enforceable?

### 1. Introduction

When a landlord or a tenant assigns his interest in a tenancy, it does not necessarily follow that the benefit and burden of each and every right and duty that existed between the original landlord and tenant continues between the assignee and the other party. Why should questions arise whether the obligations of the assignor are binding upon the assignee and, conversely, whether the assignee can take action to enforce the obligations of the other party to the tenancy agreement?

The answer lies in a distinction between privity of contract and privity of estate. The latter expression is sometimes used to describe the relationship that exists between persons who have mutual or successive interests in the same property. When a tenancy agreement is entered into between a landlord and a tenant the effect is, as we have seen, to create and convey to the tenant an "estate" in the premises. Both parties have an interest in the premises and "privity of estate" is said to exist between them.

The tenancy agreement will undoubtedly contain promises or covenants and the enforceability of them will be reinforced by the fact that "privity of contract" also exists between the landlord and tenant since they are the original parties to the transaction. What is the position if one of the parties, say the landlord, assigns his interest? Since there is no privity of contract between the tenant and the assignee, if any covenants in the tenancy

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43. Our research indicates that such a prohibition, properly framed, would be valid. The courts, however have construed such prohibitions narrowly. *See Paul* v. *Nurse*, (1828) 8 B.&C. 486, 108 E.R. 1123; *Church* v. *Brown*, (1808) 15 Ves. 258, 33 E.R. 752.

44. This recommendation is implemented in s. 9(1) of the draft legislation in Chapter X. The legislation also addresses the validity of provisions which give the landlord a right to terminate the tenancy or exercise a right of first refusal rather than approve an assignment. *See* ss. 9(5) and 9(6).

agreement are to be enforceable between them, the basis of that enforceability must be found in the concept of privity of estate.

It is a curiosity of the law that the range of covenants that are enforceable by and against persons between whom there is only privity of estate is much narrower than the range of covenants that may be enforced where both privity of estate and privity of contract exists. The true position of the parties can only be determined with reference to a confusing web of statutory, common law and equitable rules.

### 2. Statutory, Common Law And Equitable Rules

#### *(a) Statute*

A starting point is to examine a distinction which is made between covenants which "run with the land" and those which "run with the reversion." When a tenant assigns his interest in premises, he is said to assign the land. When a landlord assigns his interest in the premises, he is said to assign the reversion. If the liability to perform a covenant or the right to take advantage of it passes to the assignee of the land (the tenant's assignee), then that covenant is said to run with the land. When the liability to perform a covenant or the right to take advantage of it passes to the assignee of the reversion (the landlord's assignee), it is said to run with the reversion.

The distinction at common law between covenants which ran with the land and those that ran with the reversion was clear:[45]

> [A]t common law covenants ran with the land, but not with the reversion; therefore the assignee of the lessee was held to be liable in covenant, and to be entitled to bring covenant, but the assignee of the lessor was not.

Upon the dissolution of the monasteries in England, by Henry VIII, this distinction caused difficulty for the Crown, which was unable to take action to enforce covenants upon the leases it had acquired. This led to the enactment of the *Grantees of Reversions Act, 1540*.[46] This Act gave the assignee of a reversion the same

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45. *Thursby* v. *Plant*, (1669) 1 Wms. Saund. 237, 241, 85 E.R. 254, 270 (fn. 4(a)) (K.B.).
46. 32 Henry 8, c. 34. This Act is probably in force in British Columbia by virtue of s. 2 of the *Law and Equity Act*, *supra*, n. 25. Since the passing of the Act there is little or no practical distinction between the two kinds of covenants. The term "running with the land" is commonly used as a comprehensive term to refer to covenants which run with the reversion as well as those which actually run with the land. That is how we will use the expression hereafter unless otherwise indicated.

remedies for non-performance of conditions or covenants against the tenant and his successors as the original landlord had. The Act also gave the tenant all rights of action against assignees of the reversion as he might have asserted against the original landlord.

*(b) Common Law*

*(i) The General Rule*

The Act of 1540 did not have the effect of making all covenants run with the land. Several important considerations must still be taken into account to determine whether a covenant does or does not run with the land. The foremost of these is whether or not the covenant can be said to "touch and concern" the land. It has been suggested that this test will be met by any covenant which affects the landlord *qua* landlord or the tenant *qua* tenant. The Alberta Court of Appeal, in 1913, formulated the test as:[47]

> ... whether the thing covenanted to be done immediately affects the land itself or the mode of occupying it, or not directly affecting the nature, quality or value of the thing demised nor the mode of occupying it, is a collateral covenant only which does not bind the assigns.

A more recent British Columbia decision[48] distinguished between covenants which run with the land, and those which do not, in the following way:[49]

> The true distinction must, I think, be as between covenants to do things which will benefit the land, and therefore benefit the reversion (or to refrain from acts which will injuriously affect the land and the reversion), on the one hand, and covenants to pay money, or otherwise benefit the landlord's personal estate during the term, on the other.

Any statement of the general rule, however, will fail to convey the wide variety of different covenants which courts have examined to determine whether they meet the test of touching and concerning the land.[50]

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47. *Rudd* v. *Manahan*, [1913] 4 W.W.R. 350, 352-3.
48. *City of Vancouver* v. *Beaufort Properties*, (1982) 36 B.C.L.R. 83 (S.C.).
49. *Ibid.*, at 90.
50. *See, e.g.*, Rhodes, *supra*, n. 2, para. 15:7:1.

Some particular examples of its application were recently described by the English Law Commission in a comment critical of this body of law:[51]

> When a tenant assigns his lease, the assignee automatically becomes liable to the landlord, with whom he has "privity of estate", in respect of those covenants which "touch and concern" the property. The rules concerning covenants which ran with the land were condemned 50 years ago as "purely arbitrary and the distinctions, for the most part, quite illogical". Most if not all the covenants commonly found in leases and which directly relate to the property come within this category of those which touch and concern the land. They include the obligations to pay the rent, to repair buildings, to insure them against fire, restrictions on how the property is used, as to ways in which the tenant is entitled to dispose of the lease, and covenants relating to improving the premises.

### *(ii) A Refinement: Things in Being*

A second distinction drawn at common law arises when a tenant purports to assign the burden of a covenant. If the covenant concerns subject matter which was in existence at the time the tenancy was created, and provided that the covenant touches and concerns the land, then an assignee of the tenant is bound. If the covenant relates to something which was not in existence at the time the tenancy was created, then an assignee is bound only if the covenant names and purports to bind "assigns."

The supposed rationale for this rule was first enunciated in *Spencer's Case* in 1583:[52]

> ...when the covenant extends to a thing which is not in being at the time of the devise made, it cannot be appurtenant or annexed to the thing which hath no being...for the law will not annex the covenant to a thing which hath no being.

Various examples can be found in older English cases as to what constitutes a matter that is not yet in existence for the purpose of the rule.[53] It has also been suggested that the distinction rests on no intelligible basis[54] and that the decision in *Spencer's Case* was "without a known reason."[55]

Drafting practice reflects a cautious approach to the distinction relating to things not in existence and most tenancy

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51. The Law Commission, *Landlord and Tenant; Privity of Contract and Estate; Duration of Liability of Parties to Leases* (Working Paper No. 95, 1986) 6.
52. (1583) 5 Co. Rep. 16a, 16b, 77 E.R. 72, 74 (K.B.).
53. These have included covenants to erect new buildings, *Doughty* v. *Bowman*, (1848) 11 Q.B. 443, 116 E.R. 543 (Exch.); and to convey all the coal from a colliery on a proposed new railway, *Hemingway* v. *Fernandes*, (1842) 13 Sim. 228, 60 E.R. 89 (Chambers).
54. 27 Halsbury 303, note 5, para. 391 (4th. ed.).
55. *Minshull* v. *Oakes*, (1858) 2 H. & N. 793, 809, 157 E.R. 327, 333 (Exch.).

agreements specifically name and are made binding on "assigns." This appears to explain the paucity of contemporary authority on this question.

*(c) Equity*

The requirements that a covenant touch and concern the land and that it relate to subject matter in existence were limitations imposed by the courts which administered the common law on the kinds of covenants that would be enforced. It is important to note that there continued to be limits on the parties entitled to enforce those covenants. Covenants could not be enforced by or against parties between whom there was neither privity of contract nor privity of estate. In these cases, however, equity sometimes provided a remedy.

The remedy first emerged, not in the realm of landlord and tenant, but in connection with freehold conveyancing. It was a response to a problem that arises when an owner of land sells part of it but retains some property himself. It may be important to him to control the way in which the purchaser uses the land. The vendor can ensure this result by inserting a clause to that effect in the contract of sale. If, however, the purchaser sells the land to another person, that person is not bound by the agreement between the original parties because there is no "privity of contract" between him and the original vendor, nor is there any "privity of estate."

Equity stepped in to assist landowners and developers to exercise some control over the future use of their property. The leading case of *Tulk* v. *Moxhay*[56] in 1848 held that a covenant to maintain a garden free from any buildings upon the site would be enforced against a purchaser of the land who bought with notice of the covenant:[57]

> [T]he question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.

The doctrine enunciated in *Tulk* v. *Moxhay* was developed and refined by the courts of equity and by the end of the 19th century a well-developed body of law had emerged to define when both the burden and the benefit of a covenant survive a transfer of

56. (1848) 2 Ph. 774, 41 E.R. 1143 (Ch.).
57. *Ibid.*, at 777-8.

ownership.[58] Although this equitable doctrine developed primarily with reference to restrictive covenants attached to freehold land, in due course it was extended to covenants applicable to leasehold land.[59]

There are two important points to note with respect to the application of the equitable doctrine of *Tulk* v. *Moxhay* in landlord and tenant matters. First, equity was no more generous in the kinds of covenants it would enforce than was the common law. It too required that a covenant "touch and concern the land" and imposed further requirements such as one that the covenant be "negative." In the result, if a party could establish privity of contract or privity of estate, he gained no advantage through invoking the doctrine of *Tulk* v. *Moxhay*. The utility of the doctrine was therefore limited to situations where privity of neither kind existed.

The second point flows from the first. In the context of landlord and tenant, circumstances where privity does not exist are relatively rare. It will be recalled that "privity of estate" describes the relationship between parties who hold successive or mutual interests in the same property. Thus privity of estate will exist between a landlord or tenant and an assignee of the other and as between an assignee of each.[60] The only situation encountered with any frequency where privity does not exist and a person may wish to rely on the equitable doctrine is where a covenant is sought to be enforced as between a subtenant and the chief landlord.[61]

*(d) Conclusion*

The relationship of the various rules described above, and others, makes it difficult, except in the most straightforward cases, to determine with any real degree of certainty whether a covenant in a tenancy agreement will be enforceable against an assignee. Uncertainty and complexity may be justifiable where

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58. *See* the rules summarized in Maudsley, *Hanbury's Modern Equity* (9th ed., 1969) 601-02, 606-07. *See also* Cheshire, *The Modern Law of Real Property* (7th ed., 1954), 522-26.

59. Blundell and Wellings, *Woodfall's Law of Landlord and Tenant* (27th ed., 1968) 492.

60. The courts occasionally lose sight of this fact and invoke the equitable doctrine unnecessarily. *See, e.g., London Drugs Ltd.* v. *Truscan Realty Ltd.*, [1988] B.C.D. Civ. 2335-01 (S.C.) *per* Cowan L.J.S.C.

61. There is, arguably, an additional category of cases emerging which is not historically recognized as one for the application of equitable rules. In some recent cases it has been held that a tenant in a shopping centre may be able to enforce a non-competition covenant in his and/or the other tenant's lease if there is a common landlord. No privity would exist between two such tenants. *See, e.g., London Drugs Ltd.* v. *Truscan Realty Ltd., ibid.*; *Re Spike* v. *Rocca Group Ltd.*, (1979) 107 D.L.R. (3d) 62 (P.E.I.S.C.).

the underlying goal is clearly worthwhile. Unhappily, the underlying goal of the current rules is as obscure and uncertain as the rules themselves. Only historical values seem to argue in their favour.

### 3. Reform

Reform of the law in this area was considered by the Ontario Law Reform Commission in its *Report on Landlord and Tenant Law*.[62] It suggested that the clearest path for reform is simply to make all assignees and subsequent assignees of either the landlord or the tenant subject to all the obligations and benefits to which they would have been subject had they been the original landlord or tenant. The English Law Commission also recommended that "the distinction between lease covenants which touch and concern the land and those which do not should be abolished."[63] This approach is essentially similar to that recommended by this Commission with respect to residential tenancies.[64] It is our conclusion that this path is also the appropriate one to be followed in the reform of the *Commercial Tenancy Act*.

Three important points can be made in support of such a change. The first is that its simplicity would make the law more easily intelligible to landlords and tenants and to their legal advisors. Second, if two parties arrive at an agreement as to the terms of a commercial tenancy, it is reasonable to presume that they consider those terms fair, and that each party is prepared to fulfill his or her obligations. There is no obvious reason why some of those obligations should cease to be enforceable, simply because the tenancy or the reversion has been assigned to another party. Finally, such a reform measure is consistent with the broader evolution of the commercial tenancy from being a creature dominated by concepts of land-law, to one which incorporates a greater measure of modern contract law theory.

Notwithstanding our agreement in principle with the overall thrust of the Ontario Commission's conclusion, three subsidiary issues remain for consideration.

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62. *Supra*, n. 3 at 21-35.
63. The Law Commission, *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com. No. 174, 1988)33.
64. *See* Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships: Residential Tenancies* (LRC 13, 1973).

*(a) Continuing Liability of the Assignor*

An issue of concern to the original parties to a tenancy agreement is whether, following an assignment, liability to perform the obligation imposed by a covenant remains vested in the original covenantor or is assumed fully by the assignee. Since privity of contract exists between the original landlord and tenant, assignment does not put an end to their potential liability to each other for breaches of their covenants. The original landlord or tenant remains liable to perform unless he has been explicitly released by the other party.

This continuing liability can exist with respect to virtually any covenant, but it arises in its most critical form with respect to rent. The tenant who assigns his interest in the premises to another remains liable for the rent payable under the tenancy agreement. Usually this liability has no tangible consequences but if the assignee defaults the tenant's legal position is essentially similar to that of a guarantor. Is it a fair result that the assignor of a long-term lease might be called upon to pay rent perhaps years after he has parted with the premises (and the default was that of a subsequent assignee)?

This raises a question of principle similar to that examined by this Commission in *Report on Personal Liability Under a Mortgage or Agreement for Sale*.[65] The landowner who sells property which is subject to a mortgage to be "assumed" by the purchaser remains liable for the mortgage payments. In that Report it was recommended that, after a period, the liability of the seller should cease.

On the whole, we believe that different considerations apply in the context of commercial tenancies. Our earlier recommendations were prompted by concerns that arose in relation to mortgages of residential property and had a "consumer protection" flavour about them which is absent here. Moreover conditions in the real estate market had led to a highly visible problem with respect to residential mortgages. We are not aware that the continuing liability of the assignor of a tenancy has generated similar problems. Our conclusion is that no departure from the

65. Law Reform Commission of British Columbia, *Report on Personal Liability Under a Mortgage or Agreement for Sale* (LRC 84, 1985).

common law consequences of privity of contract is called for. None of our correspondents disagreed with this view.[66]

*(b) Personal Service Covenants*

One exception to the "reformed rule" concerning the enforcement of covenants was advocated by the Law Reform Commission of Ontario. It concerned "personal service" covenants.[67] It was suggested that where a tenancy agreement contains a provision whereby one party covenants to perform a service which is directly related to his individual personality or expertise, it would be unfair to expect the other party to be bound to accept performance of that covenant by an assignee. It was recommended that such agreements should continue to be governed by the law of contracts that is currently applicable to them.

We are not convinced that such an exception is necessary or desirable. One of the aims of reform in this area is to eliminate distinctions that serve no clear or useful purpose. It is our impression that "true" personal service covenants have become something of a rarity and to preserve a highly technical distinction in the law to accommodate them achieves little. In any event, as discussed above, the original covenantor remains in privity of contract with the other party, and thus remains obligated. The other party has his remedy if the result of the assignment is unsatisfactory.

*(c) Enforcement By or Against a Non-assignee*

Earlier in this Chapter, the running of covenants in equity was examined and it was pointed out that this body of law is relevant only where no privity of contract or estate exists between the parties. The main example of such parties are a subtenant and a chief landlord. The "reformed rule" is directed to defining the position of parties to an assignment so parties such as these would not be affected. The judge-made rules based on *Tulk* v. *Moxhay* would continue to apply.

We have considered whether this situation should also be addressed in legislation and concluded that it should not. The problem is a relatively narrow one and, in most circumstances in-

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66. The English Law Commission adopted a different view. They saw the tenant/assignor's continuing liability as "intrinsically unfair" and proposed that as a general rule the liability of the original tenant should cease after the assignment. *See supra*, n. 63.
67. *Supra*, n. 3 at 28-31.

volving the creation of a subtenancy, there is usually an opportunity for the chief landlord and the subtenant to agree as to the matter of the enforcement of covenants *inter se*. The situation would then become one in which the parties are in privity of contract. The Ontario Law Reform Commission also concluded that legislation on this point was not called for.[68]

68. *Ibid.*, at 32.

## CHAPTER V CLAIMS FOR FUTURE RENT

### A. Introduction

In Chapter III we described the classic view of the landlord and tenant relationship as one which centres on the transfer of an estate in land -- a transfer that occurs at the time the relationship is created. Rent is "earned" as soon as the transfer is made even though its payment may be deferred to one or more later dates.

Recent decisions suggest that there has been a significant retreat from the classic view of the tenancy so far as it applies to rent. The scope and import of those decisions are, however, not yet fully known or developed. Their focal point has been the landlord's claim for future rent. That is also the concern of this chapter.

The expression "future rent" is one frequently used to describe a claim for rent which would not yet be payable in the ordinary course of events. Such a claim might arise under an acceleration clause or as a claim for damages determined with reference to rent not yet payable. Each of these situations is discussed below.

### B. Acceleration Clauses

An acceleration clause is a provision of a tenancy agreement which provides that future rent is payable on the occurrence of a certain event such as the tenant's failure to pay an instalment of rent or his insolvency. A typical clause might provide:[1]

> Should the Lessee during the term of this lease abandon the premises or fail to pay the rent within the first seven days of each month, then the unpaid balance of the Lease period shall immediately become due and payable.

Another event commonly stipulated as one which may trigger an acceleration of the obligation to pay future rent is a breach by the tenant of particular provisions of the tenancy agreement, such as the one which obliges him to keep the premises in good repair. Many tenancy agreements require that the landlord give notice

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1. *Eddy Housing* v. *C. Langlais and Sons*, (1983) 131 A.P.R. 252, 255 (N.B.Q.B.-T.D.).

of his intention to invoke an acceleration clause and allow the tenant a period of grace during which he may remedy his default without penalty.[2]

## C. Damages as Future Rent

### 1. Introduction

In some circumstances, a tenant's breach of the tenancy agreement is so serious that it entitles the landlord to terminate the tenancy. A recurring situation involves the tenant's failure to pay rent coupled with his abandonment of the premises. In such a case the landlord may have a claim for damages based on the rent that has not yet become payable under the tenancy agreement.

The law that governs such claims changed significantly in 1971 with the decision of the Supreme Court of Canada in *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*[3] Before this decision, Canadian law drew a firm and clear distinction between contracts involving an interest in land and other contracts generally. As a result, the breach of a provision of a tenancy agreement did not attract the same consequences as the breach of an ordinary contract. The *Highway Properties* case has blurred this distinction and, in order to grasp its implications, a brief review of the broader legal context is necessary.

### 2. The Legal Context

#### *(a) Remedies for Breach of Contract*

At common law, an innocent party to a contract faced with a serious breach will usually have two main options. First, depending on the nature of the breach, he may be entitled to terminate the contract and thereby excuse himself from further performance of his own obligations.[4] Alternatively, he may disregard the breach and insist on continued performance of the contract.[5]

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2. *See, e.g., Highway Properties Ltd.* v. *Kelly, Douglas & Co.*, (1971) 17 D.L.R. (3d) 710 (S.C.C.).
3. *Ibid.*
4. Generally, a right to terminate a contract exists where the party in default repudiates the contract (indicates in advance that he will not honour his part of the bargain) or where he commits a fundamental breach -- one that has the effect of depriving the innocent party of substantially the whole of the benefit that was contracted for.
5. A breach of contract, regardless of the nature of the breach, will also entitle the innocent party to sue for damages: Cheshire & Fifoot, *The Law of Contract* (8th ed. 1972) 563.

Where the innocent party terminates the contract and sues for damages, certain rules governing the remoteness and measurement of damages apply.[6] The party in default is liable for losses naturally arising from breaches committed prior to the termination of the contract. The party in default may also be liable for prospective damages -- the value of future contractual benefits lost as a result of the breach. In both cases the innocent party must take reasonable steps to mitigate his losses.[7]

Where the innocent party disregards the breach and treats the contract as subsisting, he remains obligated to perform his part of the bargain. Subject to doing so, however, he may, because the contract remains in effect, claim from the other party the full performance or payment under it without having to take steps to mitigate his losses.[8]

*(b) Remedies for Breach of a Tenancy Agreement*

A recurring problem faced by landlords arises when a tenant wrongfully abandons the premises and ceases to pay rent. This is commonly referred to as a "repudiation" of the tenancy agreement.[9] At common law, a landlord faced with a tenant's repudiation of the tenancy agreement had three options available to him, apart from those provided for in the tenancy agreement.[10] These were:[11]

1. The landlord could ignore the tenant's default, affirm the tenancy agreement and sue for rent as it became payable. This option allowed the landlord to claim the full rent reserved by the tenancy agreement without obliging him to mitigate his losses.[12]

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6. *See* Fridman, *The Law of Contract in Canada* (1976) 529.
7. Fridman, *ibid.*, at 589.
8. *White & Carter* v. *McGregor*, [1962] A.C. 413 (H.L.). Whether an innocent party may insist on continued performance of the contract in every case is open to question. *See Asamera Oil Corp.* v. *Sea Oil & General Corp.*, (1978) 89 D.L.R. (3d) 1 (S.C.C.). This case is discussed later in this Chapter.
9. The use of the term "repudiation" in this context has a slightly different meaning than when it is used with reference to an ordinary contract. A lease is regarded as executed once the tenant acquires possession of the rented premises so, strictly speaking, it is not possible for a tenant to repudiate the lease in the sense of breaching an executory obligation.
10. Remedies provided in the tenancy agreement frequently parallel those available at common law. An example is a provision which entitles the landlord to re-rent the premises on behalf of the tenant, with the tenant remaining liable for any deficiency. This is similar to the second common law right described below.
11. *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*, *supra*, n. 2 at 716.
12. This option requires that the landlord leave the premises vacant for the remainder of the term of the tenancy. Unless the tenancy agreement contains an acceleration clause, the landlord must sue on an instalment basis or wait until the lease expires: *1595 Properties Ltd.* v. *Sunshine Photo Finishing Ltd.*, [1983] 4 W.W.R. 377 (B.C.S.C.). *But see E. Parker Enterprises Ltd.* v. *Dud Hut Ltd.*, (1979) 8 R.P.R. 322 (N.S.S.C.-T.D.), where the landlord was able immediately to sue for the full rent reserved so as to avoid a "multiplicity of actions." *Cf. B.G. Preeco 3 Ltd.* v. *Universal Explorations Ltd.*, (1987) 54 Alta. L.R. 65 (Q.B.).

2. The landlord could affirm the tenancy agreement and attempt to relet the premises on the tenant's behalf. Since the tenant remained bound by the terms of the original tenancy agreement, he was answerable to the landlord for any deficiency.[13]

3. The landlord could terminate the tenancy agreement, usually by resuming possession of the premises or attempting to re-let them on his own account. In this case, the landlord could claim from the defaulting tenant damages and rental arrears accruing up to the date of termination. The landlord could not, however, sue for prospective damages.

The remedies available on breach of a tenancy agreement differed from those arising on breach of contract in one significant respect: the landlord had no claim for prospective damages. This difference reflected the classic characterization of a tenancy agreement at common law. It was regarded primarily as a conveyance of an estate in land and therefore subject to the law of property.[14] A tenant was liable under the terms of a tenancy agreement for only so long as he retained his "estate" in the premises. Once the estate was divested by a proper termination of the tenancy agreement,[15] the tenant's liability ceased.

A termination of a tenancy agreement, therefore, did more than bring the tenant's estate to an end. It also terminated the contractual provisions contained in the tenancy agreement, at least so far as these might support a claim for prospective damages.[16]

### 3. The Current Law: The Highway Properties Case

As pointed out in Chapter III, in *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*[17] the Supreme Court of Canada rejected the traditional distinction drawn between tenancy agreements and ordinary contracts. It held that a landlord whose tenant is in default has a new remedy, in addition to those traditionally available at common law. He has the right to sue for prospective dam-

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13. The tenant is entitled to proper notice and the landlord must also re-let on precisely the same terms as the original lease: *Korsman* v. *Bergl*, (1967) 61 D.L.R. (2d) 558 (Ont. C.A.); *Bel-Boys Bldgs. Ltd.* v. *Clark*, (1967) 62 D.L.R. (2d) 233 (Alta. S.C.). Failure to do so might constitute a surrender and consequent termination of the lease.

14. *Goldhar* v. *Universal Sections and Mouldings Ltd.*, (1962) 36 D.L.R. (2d) 450 (Ont. C.A.).

15. The methods by which a tenancy may be terminated are limited. These are summarized in 23 Halsbury (3rd. ed.) para. 1387. In the case of wrongful abandonment, a surrender and termination of the lease occurs when the landlord acts inconsistently with the continued existence of the lease, such as by resuming possession or attempting to re-let the premises on his own behalf: *see dicta* of Laskin J. in *Highway Properties Ltd.* v. *Kelly, Douglas & Co.*, *supra*, n. 2 at 717.

16. *Ibid.* One additional factor precluded prospective damages. This relief is available only for a breach of a future or "executory" obligation. Rights arising under a tenancy agreement were not regarded as executory. *See supra*, n. 9, and *Highway Properties*, *ibid.*, at 716.

17. *Supra*, n. 2.

ages. In the wake of this decision, however, two issues remain uncertain. These are discussed below.

*(a) Prospective Damages for Default Generally*

It is not yet clear whether a landlord may claim prospective damages for a tenant's default other than abandonment. The narrowest interpretation of *Highway Properties* would restrict such a claim to situations where:

1. The tenant has abandoned the premises;
2. The tenancy agreement contains a provision requiring the tenant to carry on business continuously throughout the term of the tenancy agreement; and
3. The landlord has served the defaulting tenant with notice of his intention to claim prospective damages.

Most authorities agree that the right to claim prospective damages should not depend on the first two factors.[18] The reasoning in *Highway Properties* itself supports this view, by endorsing the application of contract law to tenancy agreements. The Court referred with approval to an Australian case where prospective damages were awarded in the absence of a "carry on business" covenant.[19]

With respect to notice, however, several cases have held that the landlord must notify the tenant of his intention to claim prospective damages. If he does not, then his claim is limited to ordinary damages and rental arrears accruing up to the date the tenancy agreement is terminated.[20] This view has not been free of criticism.[21] In particular it has been argued that the landlord's right to damages arises from the tenant's repudiation and therefore should not be made to depend on notice.[22]

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18. *See, e.g.*, Sternberg, "The Commercial Landlord's Duty to Mitigate upon a Tenant's Abandonment of the Premises," (1985) 5 Adv. Q. 385; M. Catzman, Commentary, (1972) 50 Can. B. Rev. 121; Rowntree, "Default Under A Commercial Lease," (1982) 40 Adv. 397; Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 130.
19. *Hughes* v. *N.L.S. Property Ltd.*, [1966] W.A.R. 100 (West Aust. S.C.).
20. *See, e.g.*, *R. Millward Insurance* v. *Nationwide Advertising*, (1982) 48 A.R. 284 (Q.B.); *Fuda* v. *D'Angelo*, (1974) 43 D.L.R. (3d) 645 (Ont. H.C.).
21. *See, e.g.*, Sternberg, *supra*, n. 18.
22. Bushnell, "Alternatives Available to a Landlord when a Tenant Wrongfully Abandons Rented Premises," (1975) 23 Chitty's L.J. 315.

### *(b) The Landlord's Obligation to Mitigate His Loss When Claiming Rent as It Becomes Payable*

The principles of contract law, declared applicable to tenancy agreements in *Highway Properties*, permit a landlord to sue a defaulting tenant for prospective damages. Those principles also impose a duty on the landlord to mitigate his losses. Where the tenant has abandoned the premises, this duty would, in practice, require that the landlord attempt to re-let the premises.[23] Where the landlord pursues any of the other alternatives available to him, the conventional view is that he is under no obligation to mitigate.[24] This view, however, is not entirely free from doubt. The status of the landlord's claim for rent as it becomes payable, in particular, merits further consideration.[25]

The conventional view is that where a tenant abandons commercial premises, the landlord need do nothing more than sit back and insist on the continued existence of the tenancy agreement.[26] The landlord's claim is for rent rather than damages and no question of mitigation arises. If the landlord makes no attempt to re-let the vacant premises, this will not impair his ability to eventually claim the full rent provided for in the tenancy agreement.

The conventional view of this option accords with contract law. As a general rule, an innocent party may disregard a breach and insist on the continued performance of the contract. The leading case on this issue is *White & Carter* v. *McGregor*.[27] In that case, an advertising firm contracted with a garage proprietor to display advertising signs for his business for three years. On the very day the agreement was signed, the proprietor purported to cancel the contract. The advertising firm, however, went ahead and displayed the signs and then sued successfully for the full contract price on the basis of an acceleration clause in

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23. *See Pacific Centre Ltd.* v. *Geoff Hobbs & Associates Ltd.*, [1988] B.C.D. Civ. 2336-01 (Co. Ct.) where it was held that a duty to mitigate existed where the tenant's repudiation was accepted by the landlord. *See also L.A. Furniture* v. *330061 Alberta Ltd.*, (1988) 62 Alta. L.R. (2d) 186 (Q.B.) and *Weigelt* v. *Lueke*, [1988] B.C.D. Civ. 2350-01, where the landlord's recovery was reduced or denied owing to his failure to mitigate.

24. *See, e.g., Mitchell Indus. Park Holdings Ltd.* v. *Tupniak*, [1986] B.C.D. Civ. 2334-01 (Co. Ct.).

25. There is a second area in which the issue of mitigation has also become blurred. It concerns arrears of rent, normally considered to be a debt. It was held by the Ontario Court of Appeal in *Toronto Housing Co. Ltd.* v. *Postal Promotions Ltd.*, (1982) 140 D.L.R. (3d) 117, *aff'g.* (1981) 128 D.L.R. (3d) 51 (Ont. H.C.) that the profit realized by a landlord in re-letting premises at a higher rate following the tenant's abandonment could be raised in abatement of arrears accrued before the reletting.

26. *See, e.g., Mitchell Indus. Park Holdings Ltd.* v. *Tupniak*, *supra*, n. 24.

27. *Supra*, n. 8.

the agreement. The majority of the Court, holding that an "unaccepted repudiation is a thing writ in water," concluded:[28]

> [Where there is no acceptance of repudiation], the contract remains alive for the benefit of both parties.... There is no duty laid upon a party to a subsisting contract to vary it at the behest of the other party so as to deprive himself of the benefit given to him by the contract.

On this view, an innocent party who elects to keep the contract alive has no duty to mitigate. Indeed, he may aggravate his losses with relative impunity.

The availability of this option in every case, however, is open to question. Doubt, in this regard, arises out of the decision of the Supreme Court of Canada in *Asamera Oil Corp.* v. *Sea Oil & General Corp.*[29] That case involved a bailment of certain shares. The defendant, in breach of his obligation to return the shares by a specified date, wrongfully retained them. For various reasons, the plaintiff waited six years before instituting an action for the return of the shares or damages for their wrongful detention. During this time, the value of the shares had fluctuated dramatically. The issue before the Supreme Court was the measure of damages and the proper date at which to value the shares for this purpose.

In the course of its judgment, the Court examined the doctrine of mitigation extensively and held that the plaintiff was under a duty to mitigate his losses by purchasing substitute shares within a reasonable time after the date of the breach. The plaintiff had contended that it had no obligation to mitigate, in part because it ought to be allowed to seek specific performance. Although the Court held that the case was not one for specific performance, it did indicate that the right to claim this remedy should not excuse a party from the duty to mitigate.

The Court also cast doubt on the conventional view that a plaintiff can ignore an anticipatory breach, continue with unwanted performance and then claim the full contract price:[30]

> Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found. Otherwise its effect will be to cast upon the defendant all the risk of aggravated loss by reason of delay in bringing the issue

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28. *Ibid.*, at 444-45.
29. (1978) 89 D.L.R. (3d) 1. *See also Finelli* v. *Dee*, (1968) 67 D.L.R. (2d) 393 where the Ontario Court of Appeal expressed a preference for the minority view in *White & Carter*.
30. *Ibid.*, at 26 (*per* Estey J.).

> to trial.... This is but another application of the ordinary rule of mitigation which insists that the injured party act reasonably in all of the circumstances. Where those circumstances reveal a substantial and legitimate interest in seeking performance as opposed to damages, then a plaintiff will be able to justify his inaction and on failing in his plea for specific performance might then recover losses which in other circumstances might be classified as avoidable and thus unrecoverable; but such is not the case here.

Professor Waddams suggests that the import of this passage is that an innocent party must always act reasonably. Only where it is reasonable to insist on continued performance of a contract will he be entitled to claim the full contract price:[31]

> This approach is to be welcomed in that it restricts [the ability to insist on continued performance of a contract] to the rare case where the plaintiff has the same sort of special interest in actual performance as would justify a decree of specific performance, or an injunction restraining the defendant's breach.

Another author[32] has recently argued that, as a result of *Asamera*, a landlord whose tenant has abandoned the premises is no longer entitled to ignore the breach and simply claim for rent as it falls due. He must attempt to re-let the premises in mitigation of his losses:[33]

> It is difficult to imagine what "fair, real and substantial justification" a landlord could have in refusing to accept a tenant's repudiation and continuing to make the premises available to him. The landlord ought to accept the repudiation and sue for damages; this would provide an adequate remedy for any loss he had suffered.... The tenor of the decision in Asamera is that if damages are an adequate remedy, the plaintiff will not be able to avoid his obligation to mitigate and refrain from reducing avoidable loss, simply by commencing an action for specific performance. Since a landlord now has a right to claim damages for prospective loss upon a tenant's abandonment of a lease, the absence of a duty in these circumstances can no longer be supported. To allow this situation to prevail would, in effect, deny the tenant resort to the full armoury of contractual remedies and defences, merely because the covenants in his lease may be associated with an estate in land.

There is some case law to support this view. In *Petrov Restoration Gallery* v. *Orr*,[34] Judge Catliff held, without much discussion, that a commercial landlord must attempt to re-let the premises in mitigation of his losses, even though he does not accept the tenant's repudiation and elects to keep the tenancy agreement alive.

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31. Waddams, "Damages for Failure to Return Shares," (1979) Can. Bus. L. J. 398, 406. This article provides a thorough analysis of the reasoning in *Asamera* on an issue-by-issue basis.
32. Sternberg, *supra*, n. 18.
33. *Ibid.*, at 400-01. As to when a landlord might have an interest in keeping the lease alive other than for the sole purpose of collecting rent, *see* Rowntree, *supra*, n. 18.
34. [1985] B.C.D. Civ. 2329-01 (Co. Ct.).

## D. Reform

### 1. Mitigation: The Landlord's Obligation To Re-Rent

#### *(a) The General Principle*

Where a tenant abandons the rented premises and ceases to pay rent, the commercial landlord may terminate the tenancy agreement and sue for prospective damages. The principles of contract law, declared applicable in *Highway Properties*, give the landlord the right to do so, but also impose on him an obligation to mitigate his losses when asserting such a claim. The only realistic form mitigation can take in these circumstances is for the landlord to make a reasonable effort to re-let the premises.[35]

The landlord may also elect to affirm the tenancy agreement and claim the rent due under it. The conventional view is that the landlord who adopts this course is under no duty to mitigate.[36] He may simply leave the premises vacant and sue the defaulting tenant for rent as it falls due. Alternatively he may invoke an acceleration clause and sue for the whole of the future rent (which amounts to the same thing).

In recent years the conventional view has become increasingly precarious and less respectable. The decision of the Supreme Court of Canada in *Asamera*,[37] suggests that it might not be possible to affirm a tenancy agreement where this is done for no purpose other than to facilitate the collection of rent. In other jurisdictions, the ability to affirm a contract and avoid the duty to mitigate has been heavily criticized. The Ontario Law Reform Commission, for example, has generally deplored this view and recommended that legislation be enacted to provide that there is an obligation to mitigate whether the landlord terminates the tenancy agreement or elects to affirm it.[38] In the

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35. A suggestion made in two of the responses to the Working Paper was that the burden of minimizing the loss, and finding a new party to rent the premises, should fall on the tenant whose conduct has created a potential for loss. In other words, the burden of mitigation should be on the tenant. While making the guilty bear the burdens of their conduct may be an attractive principle of moral philosophy, it has no application to mitigating the consequences of a breach of contract. In the law of contract the rule has always been that the duty to mitigate falls on the innocent party and there is no obvious reason to depart from it in the context of commercial tenancies. In any event, while the duty to mitigate may fall on the innocent plaintiff, the burden of proof with respect to mitigation is on the guilty defendant: "If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue," *Red Deer College* v. *Michaels*, [1976] S.C.R. 324, 331 *per* Laskin J. *See also Keneric Tractor Sales Ltd.* v. *Langille*, [1987] S.C.R. 440.

36. *See, e.g., Mitchell Indus. Park Holdings Ltd.* v. *Tupniak*, *supra*, n. 24.

37. *Supra*, n. 29.

38. *Supra*, n. 18 at 130.

United States, the courts have tended to adopt the view that an innocent party should always attempt to mitigate his losses, even where he does not terminate the contract.[39]

In New York, a jurisdiction which adheres to a "no mitigation" rule, this issue was considered by the Law Revision Commission of that state in its Report for 1987.[40] The law of New York conforms to what we have described as the conventional view. After a thorough consideration of this issue and a number of the arguments sometimes raised in support of a "no mitigation" rule, the Law Revision Commission concluded that, while the rule might have been plausible in feudal times, it is no longer appropriate.

In British Columbia the law imposes on a residential landlord a general duty to mitigate his losses and a specific and positive duty to re-rent premises that have been abandoned. Sections 48(5) and 48(6) of the *Residential Tenancy Act* provide:[41]

> (5) Where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his damages.
>
> (6) Without limiting subsection (5), where a tenant terminates a tenancy agreement or vacates or abandons residential premises, other than in accordance with this Act and the tenancy agreement, the landlord has a duty to again rent the residential premises at a reasonably economic rent.

The effect of these provisions is to abolish the common law right of a residential landlord simply to affirm the tenancy agreement when his tenant abandons the premises.[42] He must attempt to re-let the premises.

It seems to us that a commercial landlord should be under a similar obligation to minimize his losses. In most cases, a tenant who abandons premises does so as a result of financial difficulties. To subject a tenant to continued liability for future rent while permitting the landlord to allow the premises to sit vacant and do nothing to ameliorate the situation strikes us as unfair. Beyond the question of fairness is one of economic waste. Where premises sit idle when they could be productively employed an

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39. *Williston on Contracts* (3rd ed., 1968) vol. 11, s. 1301. *See also United States Nat'l. Bank of Oregon* v. *Homeland Inc.*, 631 P. 2d 761 (Ore. S.C., 1981); *Danpar Associates* v. *Somersville Mills Sales Room Inc.*, 438 A. 2d 708 (Conn. S.C., 1980).
40. Report of the Law Revision Commission for 1987: Memorandum Relating to the Mitigation of Damages under a Real Estate Lease, State of New York, Legislative Document (1987) No. 65, p. 491.
41. S.B.C., 1984, c. 15.
42. *See* Klippert, *Residential Tenancies in British Columbia* (1976) 141.

indirect loss is imposed on all of society. A rule of law which encourages economic waste is *per se* suspect. For these reasons, it is our conclusion that the law should require a landlord always to make a reasonable effort to re-let premises that have been vacated in breach of the tenancy agreement. Depending on the view one takes of the *Asamera* case this may already be the law.

*(b) What Conduct Constitutes Mitigation?*

What must a landlord do before it can be said that he has taken all reasonable steps to mitigate his losses? This raises a number of difficult questions. The first concerns the extent to which the terms of any new tenancy agreement must resemble those of the original tenancy agreement which it replaces before it can be said that mitigation has occurred.

Suppose the rental value of the premises, at the time of default, is less than the value under the tenancy agreement? Must /may the landlord re-rent at the decreased value or must /may he wait until he finds a tenant who is willing and able to pay the full rent stipulated in the original tenancy agreement? Analogous questions arise where the rental value of the premises has increased substantially. Must the landlord re-rent on the same terms as the original tenancy agreement or should he be entitled to take advantage of the enhanced market value, even though this might involve some delay before a suitable tenant is found?

At common law, an innocent party is not required to take all possible steps to reduce his loss.[43] He need do only that which is reasonable in the circumstances.[44] The question often arises in cases involving wrongful dismissal. These cases generally hold that the injured party's failure to accept alternative employment in a lower position or for a lesser salary does not constitute a breach of the duty to mitigate.[45] This analysis suggests that a landlord would be justified in refusing to re-let for anything less than the original rent.

The result suggested by the wrongful dismissal cases is far from satisfactory in the context of commercial tenancies. Rental markets may fluctuate dramatically. What constitutes a reasonable rent at the time the original tenancy was created may be en-

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43. *See* Waddams, *The Law of Contracts* (1977) 460.
44. *See* Fridman, *The Law of Contract* (1976) 591.
45. *See, e.g., Yetton* v. *Eastwoods Froy, Ltd.*, [1966] 3 All E.R. 353 (Q.B.); *Red Deer College* v. *Michaels*, *supra*, n. 35.

tirely unreasonable at the time the tenant defaults. To permit or require a landlord to wait until he finds a new tenant willing to bind himself to the terms of the original tenancy agreement could render the duty to mitigate meaningless.

The *Residential Tenancy Act*[46] provides some guidance on this question. The central feature of section 48(6) is a requirement that the landlord re-let at a reasonable rent. This suggests that questions of mitigation and re-letting the premises are to be determined with reference to the state of the rental market at the time the question of re-letting arises -- an eminently sensible approach. If the rental value is less than the rent reserved by the tenancy agreement, the defaulting tenant is still liable in damages for the deficiency.

Another aspect of the duty to re-let arises when this duty comes into real or potential conflict with the landlord's wish to let similar premises he may own. Consider the following example:

> L and T enter into a tenancy agreement in 1978 for certain premises. The term of the agreement is for 20 years. The rent is $100,000 per year based on an occupancy of 5000 sq. ft. at $20 psf/a. The premises are a suite of offices in a multi-story office building and are similar to most of the other space in the building. In 1989 T defaults and abandons the premises. The going rate for space in the building is now $30 psf/a. L has 40,444 sq. ft. of his own vacant space which he is attempting to let at that rate.

In the example L is trying to let vacant space of his own when suddenly an obligation to re-let the space formerly occupied by T is thrust upon him. What is his duty in those circumstances?

We doubt if he would be obliged to re-let the space at $20 and "undercut" his own space. That would not be a reasonable rent. Even if it were to rent at $30, what should be his duty? Should he be obliged to attempt to let the premises in preference to his own space? Should he give it "equal billing" with his own space in putting it forward to potential renters? Should he be entitled to ignore it until he has rented all his own space? We have

46. *Supra*, n. 41.

some sympathy with the difficulties faced by a landlord in these circumstances.

We do not believe that it is possible to provide detailed guidance to deal with problems of this kind. We do, however, believe that reforming legislation should make it clear that the landlord's duty to mitigate does not require him to re-let abandoned premises in preference to letting vacant premises of his own.

The New York Law Revision Commission addressed this issue by recommending a provision in the following form:[47]

> This section does not impose a duty on a landlord to relet the abandoned property in preference to other, substantially similar, vacant property in the same building.

Such a provision usefully clarifies the landlord's duty.

*(c) The Mechanics of Reform*

This Chapter demonstrates, we think, the extremely elusive character of the current law respecting the landlord's rights to claim future rent and the nature and extent of his obligation to mitigate his losses. We have set out our conclusions describing what we think the position should be but there remains the question of how these are to be translated into law.

The form and content of a remedial measure can be simple and straightforward where the law is relatively static and well-understood. The law surrounding claims to future rent does not fit within that description. It is relatively fluid, parts of it are very new and much of it is obscure. It does not lend itself to a simply-conceived remedial measure. A measure that does not address the full range of difficult issues that may arise in this context invites confusion. Any simplicity achieved would be illusory only. It is our conclusion that a different approach is called for. We believe that landlords, tenants and their legal advisors would benefit greatly if the law concerning future rent and the landlord's obligation to mitigate his losses was comprehensively restated in legislation.

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47. *Supra*, n. 40 at 508.

*(d) Features of a Restatement*

The restatement of the landlord's right to future rent is set out in its most rigorous form in the draft legislation in Chapter X. Below we describe the principal features of the restatement.

The basic strategy of the restatement is to provide a purely statutory remedy for future rent. That remedy would be the only one available to the landlord for future rent. The restatement provides that the remedy is available:

1. where the tenant has ceased to occupy the premises and the landlord has a right to reclaim possession. (These circumstances normally coincide with abandonment.);
2. whether or not that right to possession is exercised and whether on not the landlord elects to affirm or terminate the tenancy; and
3. without regard to the operation of an acceleration clause.

The compensation to which the landlord is entitled under the statutory remedy is determined with reference to a formula based on familiar contract principles. He is entitled to the total value of the rental arrears and all rent not yet payable, less the total value of any amounts paid or payable by a new tenant and the residual value of any portion of the premises that has not been re-rented. All of these amounts are to be converted to "present value" figures to achieve greater accuracy in assessing compensation.[48] Where a landlord fails to mitigate his loss by making reasonable efforts to re-rent the premises to a suitable tenant at a reasonable rent, the court would be entitled to reduce his compensation accordingly.

2. ACCELERATION CLAUSES

Many tenancy agreements contain acceleration clauses. Such provisions specify the circumstances in which a tenant is liable to pay rent before it is normally payable. The effect to be given such clauses has been a continuing source of concern in the reform of landlord and tenant law. In recent years the use of acceleration clauses in the context of residential tenancy agreements has been the subject of legislation. The general tendency

48. *See* s. 11 of the draft legislation in Chapter X.

has been to prohibit[49] or limit[50] their use. For example, section 5 of British Columbia's *Residential Tenancy Act* provides:[51]

> **5.** Notwithstanding any other enactment, where a tenant fails to comply with a term of a tenancy agreement, the tenancy agreement shall not provide that all or part of the rent remaining for the term of the agreement becomes due and payable.

Rent which becomes payable through the operation of an acceleration clause is simply a form of future rent. In our description of the statutory remedy for future rent it was indicated that the landlord's rights were to be determined without reference to the operation of an acceleration clause. Restricting the operation of acceleration clauses in this way is consistent with the trends noted above. This measure does, therefore, raise a question as to the role of the acceleration clause under a new *Commercial Tenancy Act*.

It is important to remember that the proposed statutory remedy for future rent only arises where the tenant has ceased to occupy the premises. A tenant who is in default and who remains in possession of the premises is outside the scope of that remedy and, *prima facie* at least, an acceleration clause will apply with full rigor.

This raises a further question whether further measures are desirable to soften that rigor. It is not difficult to envisage a situation in which it might be appropriate to do so:

> A tenant, through temporary financial reverses, allows the rent to fall into arrears. The tenant is able to satisfy those arrears and bring the tenancy back into good standing, but this is not acceptable to the landlord. Relying on an acceleration clause he demands all the future rent which had become payable through that default and threatens proceedings to obtain possession if it is not paid.

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49. *See, e.g.*, S.N.B. 1975, c. R-10.2, s. 22(1) (acceleration clause void and unenforceable); R.S.P.E.I. 1974, c. L-7, s. 100 (acceleration clause void and unenforceable); R.S.S. 1978, c. R-22, s. 20 (acceleration clause void); R.O.Y.T. 1971, c. L-2, s. 76(1), added by O.Y.T. 1972 (1st Sess.) c. 20 (acceleration clause void).

50. S.M. 1970, c. 106, s. 99. Similar provisions are found in R.O.N.W.T. 1974, c. L-2, s. 61 and in Ontario's *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 97. A new *Residential Tenancies Act*, R.S.O. 1980, c. 452, will, on proclamation, repeal Part IV, including s. 97. A new s. 7 will render all acceleration clauses void.

51. S.B.C. 1984, c. 15, replacing R.S.B.C. 1979, c. 365, s. 3(5) stipulates that any term of a tenancy agreement that is in conflict with the Act is void.

Would any relief be available to the tenant under the current law?

It is doubtful whether the tenant would be permitted to claim relief against an acceleration clause under section 21 of the *Law and Equity Act*.[52] While arguments can be raised that the operation of an acceleration clause in a tenancy agreement might constitute a penalty, the authority respecting the status of acceleration clauses in mortgages suggests that these arguments would not succeed.[53]

Should the law provide the tenant some form of relief against the operation of an acceleration clause? On one view, the answer is no. It might be argued that the availability of relief would only encourage default by tenants -- the landlord needs the threat of acceleration to stimulate the prompt payment of rent. On the other hand, acceleration can operate harshly. The tenant's default may be a relatively minor one and he may be able to remedy it before any serious inconvenience to the landlord has occurred. It seems unfair not to allow him to do so and some general power to relieve the tenant from the effect of the acceleration would appear to be desirable.

On balance we find the arguments favouring relief for the tenant persuasive. The necessary reform could be achieved by a simple amendment to section 21.1 of the *Law and Equity Act*.[54] Presently, this provision empowers a court to grant relief from the operation of an acceleration clause in certain transactions. It provides:

> **21.1** (1) Notwithstanding an agreement to the contrary, where by reason of default in payment of any money due under, or in the observance of a covenant contained in
>
> (a) a chattel mortgage as defined in the *Chattel Mortgage Act*,
>
> (b) a conditional sale as defined in the *Sale of Goods on Condition Act*,
>
> (c) a mortgage of land,
>
> (d) an agreement for sale of land,
>
> the payment of money or the doing of anything is or may be required at an earlier time than would be the case if the default had not occurred, then, in a proceeding for the enforcement of rights under the instrument, the court may, before a final disposition of the proceeding, relieve any person from the consequences of the default.

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52. R.S.B.C. 1979, c. 224, s. 21 gives the court a general power to relieve against penalties and forfeitures. Its operation is discussed in Chapter VII.

53. *Emerald Christmas Tree Co.* v. *Boel & Sons*, (1979) 13 B.C.L.R. 122 (C.A.).

54. *Supra*, n. 52. Paragraphs (a) and (b) of subsection (1) will be repealed on the coming into force of the *Personal Property Security Act*, S.B.C. 1989, c. 36.

(2) In granting relief under subsection (1), the court may impose any terms as to costs, expenses, damages, compensations and all other matters it considers appropriate.

This provision, essentially, creates a right of reinstatement. We recommend that it be amended so relief under it can also be granted with respect to accelerated rent under a commercial tenancy agreement.[55] The supervision of the court should minimize or eliminate abuse. The tenant who is chronically in default is unlikely to get a sympathetic hearing.

55. *See* s. 101 of the draft *Tenancy Laws Amendment Act* in Chapter X.

## A. The Nature of the Problem

When a tenant of commercial premises becomes bankrupt, his trustee must confront a number of difficult problems arising out of the landlord and tenant relationship:[1]

> These problems flow from the conflict which occurs between the interests of the landlord and the interests of the trustee. On the one hand, the landlord is anxious to have his use of the premises disturbed as little as possible, he wishes to obtain the maximum amount of compensation for the disturbance which has occurred in the tenancy, and he wishes to be free to select a new tenant as quickly as possible. On the other hand, the trustee of the bankrupt estate desires to have the fullest possible use of the demised premises, he is anxious to dispose of the lease as an asset of the estate with a minimum of expense and without incurring personal liability, and he wishes to have the landlord's claim as a creditor against the estate restricted to a reasonable sum.

Originally, these problems were addressed by federal legislation, the *Bankruptcy Act* of 1919.[2] Section 52 of that Act provided for a scheme of adjustment of landlords' rights that applied in all the provinces.

In 1923, however, the Supreme Court of Quebec[3] declared that certain provisions of section 52 were *ultra vires*. The response of Parliament was swift. In that same year, section 52 was repealed and replaced by a provision stipulating that the rights and priorities of a landlord were to be determined according to the law of the province in which the rented premises were located.[4] Most provinces then enacted legislation similar to the provision that had been repealed.[5] When the *Bankruptcy Act* was amended in 1949, however, the federal government reassumed control over two areas affecting a landlord's rights: the priority of a landlord's claim and the release of property under seizure for rent.[6]

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1. Houlden, "Bankruptcy of the Landlord or Tenant," (1965) 7 C.B.R. 113.
2. S.C. 1919, c. 36.
3. *In re Stober*, (1923) 4 C.B.R. 34 (Que. S.C.).
4. S.C. 1923, c. 31, s. 31.
5. *See, e.g., Landlord and Tenant Act Amendment Act, 1924*, S.B.C. 1924, c. 27.
6. *Bankruptcy Act*, 1949, S.C. 1949 (2nd Sess.), c. 7, ss. 42(4) and 95(1)(f).

## B. The Current *Bankruptcy Act*

Under the current *Bankruptcy Act*, a lease held by a bankrupt tenant constitutes property which, subject to the rights of secured creditors, vests in the trustee upon the tenant's bankruptcy.[7] Section 146 of the Act provides:

> Subject to priority of ranking as provided by section 136, and subject to subsection 73(4), the rights of landlords shall be determined according to the laws of the province in which the leased premises are situated.

Thus, subject to the two exceptions noted, this aspect of bankruptcy law has changed little since the 1923 amendment.

The first exception concerns priority. Section 136(1)(f) of the *Bankruptcy Act* provides for priority of ranking of various creditors' claims, including that of the landlord. In the scheme governing payment of preferred creditors, a landlord's claim ranks sixth with respect to rental arrears for the three month period preceding the bankruptcy, and for three months' rent thereafter if the lease contains a provision for accelerated rent.[8]

The second exception concerns distress. Section 73(4) requires that property of the bankrupt that is under seizure for rent or taxes be released to the trustee on production of the receiving order or assignment.[9]

## C. The *Commercial Tenancy Act*, Section 32

In British Columbia, a trustee's right to deal with a bankrupt's interest in a tenancy agreement is governed by section 32 of the *Commercial Tenancy Act*. Most provinces have similar legislation.[10] Generally, however, these enactments employ sufficiently different language that it is unsafe to rely on cases construing them.[11]

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7. *Bankruptcy Act*, R.S.C. 1985, c. B-3, s. 71(2).
8. S. 136(1)(f), however, goes on to limit the amount of the landlord's preferred claim to the amount realized from the property on the leased premises.
9. If the property under seizure is sold, the proceeds less the costs of the distress and sale must be paid to the trustee: *Re Stan-Don Supply (Sudbury) Ltd.*, (1968) 11 C.B.R. (N.S.) 243 (Ont. S.C.). However, if the goods are sold and the proceeds paid to the landlord prior to the receiving order in bankruptcy (but not before the filing of the petition), the landlord is entitled to keep the proceeds: *Price Waterhouse Ltd.* v. *Marathon Realty Co.*, (1979) 32 C.B.R. (N.S.) 71 (Man. Q.B); *Re Southern Fried Foods Ltd.*, (1976) 21 C.B.R. (N.S.) 267 (Ont. S.C.). A distress made less than three months prior to the bankruptcy may also be subject to attack under the Act as a fraudulent preference. *See Thorne Ernst & Whinney Inc.* v. *Gazzola*, [1989] B.C.D. Civ. 545-02.
10. *See, e.g., Landlord and Tenant Act*, R.S.O. 1980, c. 232, ss. 38, 39; *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, ss. 43, 44; *Landlord's Rights on Bankruptcy Act*, R.S.A. 1980, c. L-7.
11. *See* Hyndman, "Trustee v. Landlord. The British Columbia Experience," (1985) 57 C.B.R. 93, 95. *See also* (1985) 43 Adv. 477, 478.

Section 32 is a lengthy provision and its full text is reproduced in Appendix A. Very generally, however, the section operates as described below.

### 1. Subsection (1)

Section 32(1) provides that the interpretation section of the *Bankruptcy Act* may be referred to in construing section 32. That is a potentially useful idea and it is a great pity that it has not been resorted to in drafting section 32 which, for a relatively modern provision, is badly structured and drafted. Use of the defined terms and expressions of the *Bankruptcy Act* would greatly improve its coherence and readability.

### 2. Subsection (2)

Subsection (2) enables the trustee to "hold and retain" the premises for three months from the date of the receiving order or assignment, or until the expiration of the tenancy agreement, whichever occurs first. The trustee may exercise this right regardless of the terms contained in the tenancy agreement. A provision that the tenancy is terminated by the bankruptcy of the tenant would, therefore, not appear to impair the trustee's rights.[12]

If the lease is terminated prior to the bankruptcy of the tenant,[13] section 32(2) would not apply since there are no "leased" premises capable of being retained by the trustee.[14] Otherwise, so far as the tenancy agreement contains provisions that are not repugnant to the trustee's right to "hold and retain," he would appear to be bound by them.[15] In effect, section 32(2) allows the trustee limited possession of the premises for the purpose of administering the bankrupt's estate.

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12. S. 32(2) gives the trustee the unqualified right to remain in possession of the premises for up to three months after the receiving order, even where the lease provides that the tenancy is automatically terminated by bankruptcy: *Raymond* v. *Hyatt Constr. Corp.*, (1983) 47 C.B.R. 179 (B.C.S.C.), *rev'd.* in part (1984) 51 B.C.L.R. 129 (C.A.).

13. That is, prior to the date the petition or assignment is filed (s. 71 (1) of the *Bankruptcy Act* deems a bankruptcy to commence at that time).

14. *See Standard Trusts* v. *D. Steele Ltd.*, (1921) 2 C.B.R. 183 (B.C.S.C.), *aff'd.* (1922) 3 C.B.R. 141 (B.C.C.A.).

15. On its face, this would seem to cover the obligation to pay rent, whether or not the trustee occupies the premises. The case law, however, suggests otherwise: *see Re Century 21 Brenmore Real Estate Ltd.*, (1983) 46 C.B.R. 72 (Ont. S.C.).

### 3. Subsection (3)

If the tenant's bankruptcy does not cause a termination of the lease,[16] the trustee has additional rights under subsection (3). He may surrender possession of the premises to the landlord, thereby terminating the tenancy. Alternatively, he may elect to retain the premises.[17] In either case he must make his election within the three month time period contemplated by subsection (2).[18] If the trustee elects to retain the premises, he may then assign the unexpired portion of the tenancy to the same extent that the bankrupt tenant could have done had the bankruptcy not occurred.

If the tenancy agreement provides that the landlord must first consent to an assignment, the trustee may circumvent this provision by securing the approval of the Supreme Court.[19] Case law indicates that the trustee must satisfy the court that the proposed assignee is personally and financially responsible, that he will be willing and able to honour the provisions of the tenancy agreement and that he will make fit and proper use of the premises.[20] The payment of rental arrears will not be made a condition of the court's approval.[21] Before occupying the premises, the assignee must pay to the landlord the equivalent of three months rent as security against non-compliance with the terms of the tenancy agreement.

### 4. Subsection (4)

Subsection (4) permits the trustee to disclaim the tenancy agreement at any time before surrendering possession. This provision should be read in conjunction with section 20(1) of the

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16. *E.g.*, where the lease is silent as to the effect of a bankruptcy, or where the lease does not automatically terminate on bankruptcy, but rather terminates at the option of the landlord.

17. S. 32 does not expressly require the trustee to make an election nor indicate the procedure to be followed, although s. 32(4) suggests that an assignment of the lease depends on an election having been made. Whether it is necessary for a trustee to make an election at all in order to retain the lease is questionable. Under s. 71(2) of the *Bankruptcy Act*, the lease automatically vests in the trustee and remains vested until he disclaims, surrenders or assigns the lease. Any requirement for election would, therefore, appear to be redundant. *See Re Hip Pocket Ltd.*, (1977) 24 C.B.R. 249 (Ont. S.C.); Hyndman, *supra*, n. 11 at 104-106.

18. *Davis, Daignault, Schick & Co.* v. *K & H Holdings Ltd.*, (1986) 3 B.C.L.R. (2d) 275 (C.A.).

19. It is unclear whether court approval is necessary where the landlord consents to the assignment. The language of s. 32(3) suggests that it is not. The last sentence of s. 32(4), however, suggests that the assignee must be a person approved by the court under s. 32(3) (at least if the trustee is to limit his liability for occupation rent).

20. *Peat Marwick Ltd.* v. *Kingswood Holdings Ltd.*, (1983) 46 B.C.L.R. 267 (S.C.). It seems that the grounds upon which a landlord refuses his consent to an assignment might not be considered by a court when approving a proposed assignee: *see Re Robinson, Little & Co.*, (1987) 56 Alta. L.R. (2d) 319 (C.A.).

21. *Re Smitty's Place Ltd.*, (1984) 53 B.C.L.R. 330 (S.C.).

*Bankruptcy Act*, which allows the trustee, with the permission of the inspectors, to divest himself of an interest in the real property of the bankrupt by executing a notice of quit claim or disclaimer. In this context, disclaimer differs from surrender. Disclaimer is regarded as a unilateral act on the part of the trustee terminating the lease. A surrender involves giving up of the tenancy with the consent of the landlord.[22] For practical purposes, however, the effect appears to be the same. In both cases, the tenancy agreement and the trustee's liability for occupation rent are terminated.[23]

Subsection (4) also provides that occupation by the trustee for the purposes of the trust estate shall not be regarded as evidence of an intention to retain the premises. Consequently, a trustee may occupy the premises for the three month period contemplated by subsection (2) without impairing his ability to disclaim the tenancy agreement.[24] If the trustee elects to retain and assign the premises then his liability, and the liability of the bankrupt's estate, for occupation rent is limited to the period during which the trustee was in possession of the premises.[25]

### 5. Subsections (5) and (6)

Subsections (5) and (6) concern a landlord's claim for rent owed by the bankrupt tenant. Subsection (5) provides that the landlord has a preferred claim against the estate for three months rental arrears and for costs of distress incurred with respect to those rental arrears. Subsection (6) requires that the landlord prove as a general creditor for other rental arrears and for any accelerated rent to which he is entitled under the tenancy agreement, provided this does not exceed the equivalent of three months' rent.

These provisions must be read in conjunction with section 136(1) of the *Bankruptcy Act* which, as noted earlier, sets out the priority of claims of preferred creditors. A landlord's preferred claim ranks sixth in the distribution of the proceeds realized from the bankrupt's estate. Paragraph (f) states that the amount

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22. *See Office Specialty Mfg. Co.* v. *Eastern Trust Co.*, (1931) 13 C.B.R. 166 (N.B.S.C.-A.D.).
23. Houlden, *supra*, n. 1 at 124-125.
24. But, until the trustee disclaims, he is liable to pay occupation rent by virtue of s. 32(7). A disclaimer does not operate retroactively.
25. Hyndman, *supra*, n. 11 at 107 criticizes the drafting of s. 32(4) which, it appears, limits the liability of the trustee only where he elects to retain the lease and then assigns it to a person approved by the court. The section is silent on the result where the trustee elects to retain the premises but is unable to assign to a person approved by the court.

payable against the landlord's claim is three months' rental arrears and three months' accelerated rent if this is provided for in the tenancy agreement. Whether a landlord is barred by section 32(6) of the *Commercial Tenancy Act* from making a preferred claim for accelerated rent is therefore open to question.[26]

The *Bankruptcy Act* also provides that the amount payable to a landlord, as a preferred creditor, may not exceed "the realization from the property on the premises." Therefore, if there are no assets on the premises to realize, the trustee will disallow the landlord's claim as a preferred creditor for arrears of rent. A landlord may not rely on provincial legislation to circumvent the effect of section 136 of the *Bankruptcy Act*.[27]

#### 6. Subsection (7)

Subsection (7) states that the trustee is liable for occupation rent for the period during which he actually occupies the premises after the date of the receiving order or assignment. Occupation rent is to be in the same amount and according to the terms of the original tenancy agreement. However, rent that has been paid in advance for that period, or payments in respect of accelerated rent, are to be credited against the amount owed by the trustee for occupation rent.

#### 7. Subsection (8)

Subsection (8) prohibits the landlord from distraining against the goods of the bankrupt tenant after the date of the receiving order or assignment. Goods distrained before that time must be delivered to the trustee. This provision should be read in conjunction with section 73(4) of the *Bankruptcy Act*, which provides that property of the bankrupt under seizure for rent or taxes shall be delivered to the trustee on production of the receiving order or assignment. Where a distress has been fully completed prior to the date of the bankruptcy, however, the landlord may be entitled to keep the proceeds.[28]

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26. This issue is discussed below under heading E.2: "Landlord's Preferred Claim for Rent."
27. *See, e.g., Re Head and Fish*, (1975) 21 C.B.R. 94 (B.C.S.C.).
28. *See* n. 9, *supra*.

### 8. Subsection (9)

Finally, subsection (9) limits the personal liability of the trustee to the value of the bankrupt's assets in the trustee's hands. For example, if the trustee occupies the premises for the three month period envisaged by subsection 2, and there are no assets in the bankrupt's estate, the trustee will not be obliged to pay occupation rent.[29]

## D. Federal Bankruptcy Reform

Section 32 of the *Commercial Tenancy Act* was first enacted as section 33 of the *Landlord and Tenant Act*[30] in 1924 following the repeal, in 1923, of section 52 of the federal *Bankruptcy Act*. The latter section attempted to regulate the rights of a landlord and tenant on a federal basis. When aspects of section 52 were held to be *ultra vires*,[31] the section was repealed in its entirety and the area was stipulated to be a matter to be dealt with by provincial law.[32]

The current *Bankruptcy Act* was enacted in 1949.[33] This Act became the subject of increasing criticism in the following years. As a result, the Study Committee on Bankruptcy and Insolvency Legislation (the Tasse Committee) was appointed in 1966 to review bankruptcy and insolvency legislation in Canada. The Tasse Committee published its report in 1970, which recommended the enactment of a new *Bankruptcy Act* that would establish a more comprehensive and integrated bankruptcy system.[34]

The recommendations of the Tasse Committee were brought forward in a series of "exposure bills" that were introduced into both the Senate and The House of Commons between 1975 to 1984.[35] All took the form of a modern and comprehensive bankruptcy statute. None were enacted.

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29. *See, e.g., Re Mavericks Restaurants Ltd.*, (1986) 60 C.B.R. 303 (B.C.S.C.).
30. S.B.C. 1924, c. 27.
31. *In re Stober*, *supra*, n. 3.
32. S.C. 1923, c. 31, s. 31.
33. S.C. 1949 (2nd Sess.), c. 7.
34. *Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970).
35. Bill C-60, *Bankruptcy and Insolvency Act, 1975*, 1st Sess., 30th Parl., 1975; Bill S-11, *Bankruptcy and Insolvency Act, 1978*, 3rd Sess., 1977-78; Bill S-14, *Bankruptcy and Insolvency Act, 1979*, 4th Sess., 30th Parl., 1978-79; Bill C-12, *Bankruptcy Act, 1980*, 1st Sess., 32nd Parl., 1980; Bill C-17, *Insolvency Act*, 2nd Sess., 32nd Parl., 1984.

The Tasse Committee took a robust view of the legislative authority of the Parliament of Canada and concluded that legislation in relation to insolvent or bankrupt tenants is clearly within it.[36] Concluding further that provincial legislation fails to deal with many important problems arising on a tenant's bankruptcy, the Committee recommended that a provision similar to section 52 of the 1919 Act should form part of a new bankruptcy statute.

Section 197 of Bill C-17, the latest of the "exposure bills," illustrates the way this recommendation might be implemented. The section is reproduced in its entirety in Appendix D to this Report. As is evident from even a cursory examination, this section deals exhaustively with the respective rights, duties and powers of the landlord, the tenant and the trustee when the tenant becomes bankrupt. In particular, the section clarifies the right of the trustee to occupy the premises and to retain or disclaim the tenancy agreement and the landlord's right to receive rent. The section also clarifies the rights of a sub-lessee and of a mortgagee of the tenancy agreement.

In 1985, the Minister of Consumer and Corporate Affairs, noting the failure of previous attempts to introduce a wholly new *Bankruptcy Act*, appointed a special Advisory Committee to review the possibility of introducing less ambitious amendments to the current *Bankruptcy Act*. The special Committee published its report in January of 1986 and identified twelve areas as most urgently requiring amendment.[37] The Committee did not address the need identified by the Tasse Committee for federal legislation regulating landlord and tenant matters. It did, however, recommend that the priority accorded a landlord's preferred claim under section 136(1)(f) of the *Bankruptcy Act* should be abolished:[38]

> In the past, the landlord, being an owner of immovable property, was deemed an important cog in the economic world who had to be protected to a greater extent than the suppliers of goods and services and other creditors. However, in 1985, such additional protection is unwarranted, although provincial law does give such a priority. A landlord's claim should be treated equally with the claims of other unsecured creditors and the landlord's privilege should be abolished. The estate should still be responsible for payment of occupation rent as an administrative expense.

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36. *Supra*, n. 34 at 131-132.
37. *Report of the Advisory Committee on Bankruptcy and Insolvency* (1986).
38. *Ibid.*, at 80.

## E. Reform

### 1. Threshold Issues

Should a provision comparable to section 32 be carried forward into a new *Commercial Tenancy Act*? Its very presence in the current Act must puzzle many people who regard bankruptcy, and the rights attendant thereon, to be a federal matter. It was enacted to fill what was then perceived to be a gap in the power of Parliament to legislate with respect to bankruptcy. The filling of such gaps was a familiar exercise for provincial legislatures early in this century. Between 1880 and 1919 Canada had no bankruptcy legislation and the provinces did the best they could to fill that void by enacting a collection of statutes that must look very odd indeed to anyone who is unaware of the background.[39]

If a court were to reconsider the constitutional validity of the provision of the *Bankruptcy Act* held to be *ultra vires* in 1923, or the provision in Appendix D, the chances are very good it would uphold them. That was certainly the view of the Tasse Committee. Given this background, why should the province continue to fill a gap which the Parliament of Canada, arguably, is quite capable of filling itself? Why not simply repeal section 32? If the Parliament of Canada feels that trustees in bankruptcy would be left with inadequate powers as a result, let it get on with bankruptcy reform -- something that is long overdue in any event.

While we are not without sympathy for the view that section 32 should simply be repealed, we are reluctant to make such a recommendation. Trustees need special powers to deal with tenant bankruptcies and in the final analysis it matters little to those directly involved what the source of those powers are. A gap in the law is no more desirable now than it was in 1923 and it is profitless to debate about the responsibility for its repair. If trustees are not able to deal effectively with the bankrupt's estate, creditors suffer and this cannot be justified.

What, then, is the correct approach to the reform of section 32 in the light of the federal bankruptcy initiatives? It might be argued that any recommendations at this time would be mis-

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39. *See* Law Reform Commission of British Columbia, *Report on Creditor's Relief Legislation: A New Approach* (LRC 42, 1979).

placed since they may be overtaken by federal legislation. Equally, it could be argued that previous attempts to revise the *Bankruptcy Act* have been notoriously unsuccessful and it would be folly to delay improving the law at the provincial level because of that possibility.

It is our conclusion that we should proceed to deal with section 32 without regard to possible bankruptcy reforms. In other words we propose to treat this section exactly like any other provision of the *Commercial Tenancy Act*. It can be greatly improved from both a drafting and a substantive point of view and then incorporated into our draft legislation. Below, we discuss the changes in substance that we believe are desirable.

### 2. Landlord's Preferred Claim For Rent

We noted previously an apparent conflict between the *Bankruptcy Act* and the *Commercial Tenancy Act* regarding the extent of a landlord's preferred claim for rent. Under the federal Act, a landlord has a preferred claim for three months' rental arrears and three months, accelerated rent if the tenancy agreement contains an accelerated rent provision.[40] Subsections 32(5) and (6) of the *Commercial Tenancy Act*, however, limit the landlord's preference to three months' arrears of rent. So far as the tenancy agreement provides for accelerated rent, the landlord is entitled to prove only as a general creditor and then only for a maximum of three months' rent.

When section 32 of the *Commercial Tenancy Act* was first enacted in 1924, the federal Parliament had expressly abandoned, to provincial authority, the regulation of all matters relevant to a landlord's rights on bankruptcy.[41] This situation persisted until the *Bankruptcy Act* was amended in 1949. With these amendments, the federal government reassumed control over two areas: the priority ranking of a landlord's claim and the release of a bankrupt's property under seizure by the landlord for payment of rent.[42] In light of these amendments, the status of provincial legislation such as subsections 32(5), (6) and (8) of the *Commercial Tenancy Act*, which deal with the same subject matter, is called into question.

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40. *Bankruptcy Act*, *supra*, n. 7, s. 136(1)(f).
41. *The Bankruptcy Act*, S.C. 1923, c. 31, s. 31.
42. *Bankruptcy Act*, 1949, S.C. 1949 (2nd Sess.), c. 7, ss. 42(4) and 95, now ss. 73(4) and 136(1)(f) of the *Bankruptcy Act*, R.S.C. 1985, c. B-3.

This issue was considered by the Supreme Court of Canada in *Re Gingras Automobile Ltée.*[43] It was held that where the extent of a creditor's preference under provincial law differs from the priority structure provided in section 95 (now section 136) of the *Bankruptcy Act*, the federal legislation must prevail.

In a later British Columbia case, *Re Head and Fish*,[44] the effect of section 32(5) of the *Commercial Tenancy Act* was specifically called into question. Although *Re Gingras* was not mentioned, the court reached a similar conclusion. Briefly, the facts were that the landlord had asserted a preferred claim for three months' arrears of rent. At the date of the bankruptcy, there were no assets on the premises. The trustee disallowed the landlord's claim on the grounds that section 136(1)(f) of the *Bankruptcy Act* expressly limits the amount payable on a landlord's preferred claim to the realization from the property on the premises. The landlord argued that section 32(5) of the *Commercial Tenancy Act*, which does not contain any similar limitation, applied to the exclusion of section 136 of the federal Act. The Court disagreed and held that inasmuch as the federal Parliament had occupied the field, subsection 32(5) was inoperative:[45]

> [T]he field of bankruptcy is a field reserved exclusively to the federal Parliament. It has chosen in the legislation to give the landlord a preferred category, but with a limitation to attach the goods of the tenant as they existed on the premises at the time of the bankruptcy.... My view is that the provision under s. 107 of the *Bankruptcy Act* is definitive of the landlord's rights. By that I mean that Parliament has stated that the landlord should rank as a preferred creditor and secondly has stated in what way the landlord shall be preferred. It has then left nothing to be considered so far as the rank or manner of the rank is concerned.... By enacting s. 33(5) [now s. 32(5)] of the *Commercial Tenancies Act*, the provincial Legislature is seeking to enlarge upon the federal field by deleting the express limitations by the federal Parliament. If s. 107(1)(f) [now s. 136(1)(f)] of the *Bankruptcy Act* was omitted, then I think s. 117 [now s. 146] of the same Act could apply, and reference might then be made to s. 33(5) [now section 32(5)] of the *Commercial Tenancies Act*.

The same reasoning applies with equal force to section 32(6), although that provision purports to abridge rather than enlarge upon a landlord's rights by limiting the preference to which he is entitled under the federal Act.

It is our conclusion that subsections (5) and (6) of section 32 no longer serve any useful purpose and need not be carried for-

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43. 1962) 4 C.B.R. 123.
44. *Supra*, n. 27.
45. *Ibid.*, at 95-96.

ward into new legislation. They concern an area now fully occupied by federal bankruptcy legislation.

### 3. Limitations On Distress

Earlier it was pointed out that subsection (8) prohibits the landlord from distraining against a tenant's goods after he has become a bankrupt and requires that goods distrained before that time must be delivered to the trustee. This provision has also been overtaken by the 1949 amendments to the legislation.[46] Section 73(4) of the *Bankruptcy Act* now requires that distrained property be delivered to the trustee. Subsection (8) is, therefore, redundant and need not be carried forward.

### 4. Trustee's Liability For Payment Of Occupation Rent

Section 32(2) gives the trustee an unqualified right to "hold and retain" the premises for a period of three months following the bankruptcy of the tenant. During this time, of course, the landlord will be anxious to receive some compensation for the trustee's use of the premises, as well as for his inability during this time to deal with the premises so as to minimize the losses consequent upon his tenant's bankruptcy.

At common law, a trustee stands in the same position as an assignee of the tenancy agreement[47] and is bound by certain covenants in the tenancy agreement, which should, in theory, include the covenant to pay rent.[48] It seems, however, that the trustee's liability for rent depends on his actual occupation of the premises. If he does not occupy the premises, he is not liable to pay occupation rent.[49]

The obligation of the trustee to pay occupation rent is a personal one,[50] although he may indemnify himself from the assets of the estate. In this regard, occupation rent is regarded as an expense of the trustee and under section 136 of the *Bankruptcy Act*,

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46. *Supra*, n. 42.
47. *See* Rowe, "The Trustee in Bankruptcy's Liability for Occupation Rent," (1984) 51 C.B.R. 206.
48. *Ibid.*; *see also* Houlden, *supra*, n. 1 at 115. For a discussion of the extent to which the covenants in a tenancy agreement bind an assignee, *see* Chapter IV.
49. *In re Walsh*, (1924) 5 C.B.R. 27 (Ont. S.C.); *Re Toyerama Ltd.*, (1981) 37 C.B.R. 275 (Ont. S.C.); *Re Century 21 Brenmore Real Estate Ltd.*, *supra*, n. 15. Houlden, *supra*, n. 1 at 115, questions the correctness of these decisions.
50. *In re Auto Experts Ltd.*, (1921) 1 C.B.R. 418 (Ont. S.C.), *aff'd.* (1921) 49 O.L.R. 256 (S.C.-A.D.). If the trustee carries on the business of the bankrupt, it is arguable that occupation rent falls within s. 31(4) of the *Bankruptcy Act*, which deems debts incurred in those circumstances "to be debts incurred ... by the estate," and the landlord's claim is against the estate only. There appears to be no case law on this point.

it must be satisfied before the claims of other preferred creditors can be met. If, however, the property of the bankrupt is not sufficient, the trustee must absorb the difference as a personal loss. He is not relieved of his liability to the landlord.

The position of the trustee with respect to occupation rent has been the subject of legislation in some provinces. It is, however, by no means uniform. In some provinces, legislation clearly endorses the common law position that a trustee is personally liable so long as he occupies the premises. In Alberta, for example, section 5(2) of the *Landlord's Rights on Bankruptcy Act* provides:[51]

> **5.** (2) The trustee shall pay to the landlord for the period during which the trustee actually occupies the premises from and after the date of the receiving order or assignment a rental calculated on the basis of the lease.

In other provinces, legislation relates the liability of the trustee to pay occupation rent to the distribution of the bankrupt's property. The landlord's claim for occupation rent is placed in the same category as a claim for rental arrears and accelerated rent.[52]

British Columbia has settled in a different way the issue of a trustee's personal liability for occupation rent. While subsections 32(4) and (7) of the *Commercial Tenancy Act* make it clear that a trustee is liable to pay rent so long as he occupies the premises, subsection (9) limits that liability to the value of the bankrupt's assets in the trustee's hands.[53] For example, a trustee may rely on section 32(2) to occupy the premises for three months. If the rent for this period amounts to $12,000, but the bankrupt's assets are worth only $1,000, the landlord will face a shortfall of $11,000 by virtue of subsection (9).

As the example above indicates, the combined effect of subsections 32(2) and 32(9) can visit a very real hardship on the landlord where there are few, or no, assets in the hands of the trustee yet the trustee uses those provisions to occupy the premises for three months and then denies liability for rent. If the trustee acts wilfully or recklessly in this regard, or otherwise

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51. R.S.A. 1980, c. L-7.
52. *E.g.*, *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1; *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 38(1). Statutes which adopt this approach may, by assimilating occupation rent to arrears, subject it to the priorities of s. 107 of the *Bankruptcy Act*. On this analysis, a claim for occupation rent is a claim against the estate, and not against the trustee personally: *see* Rowe, *supra*, n. 47 at 209-210.
53. *See Re Mavericks Restaurants Ltd.*, *supra*, n. 29.

proceeds in flagrant disregard of the landlord's position, it can only be described as an abuse. This particular concern prompted a letter to the Commission which pointed out:

> Section 32, quite reasonably, allows a trustee who is in possession of the assets of the estate of the bankrupt time to dispose of them and even to sell the business, with the proceeds to be applied towards the rent. What it unreasonably allows, is a trustee with no assets to occupy premises with neither the capability nor the intention of paying rent.

Our correspondent's concern was stimulated by a case known to him in which the trustee was aware from the outset that there would be no assets available for the estate. Nonetheless, he occupied premises leased by the bankrupt for two months following the bankruptcy despite repeated requests from the landlord for possession.

Section 32 of the *Commercial Tenancy Act* places the landlord in a legal position which is much less favourable than that accorded other potential trade creditors who deal with the bankrupt estate. Unlike the latter group, the landlord is essentially a captive creditor. He has no option but to deal with the trustee and allow him to occupy the premises.[54] The landlord's search for a new tenant may be set back by up to three months, perhaps to his loss in a volatile rental market.

The landlord's unenviable position is exacerbated by the potential for (and real) abuse noted above. If the trustee chooses to retain possession of the premises for the full three months, even in the face of a worthless estate, the landlord's hands are tied. During this time, he cannot deal with the premises so as to minimize his own losses nor can he be assured of receiving full compensation for the trustee's use of those premises. It is our conclusion that the liability of the trustee in bankruptcy for occupation rent should be defined somewhat differently than it is currently under section 32.

What is the correct approach to reform? Our view is that the most urgent concerns stem from the limitations on the trustee's liability. While a landlord may feel aggrieved that he is disabled from re-letting the premises to a new tenant while the trustee is in occupation, so long as he is appropriately compensated he is no worse off than if the bankrupt tenant has remained in possession during that period. The proper focus of reform, there-

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54. *See* Rowe, *supra*, n. 47 at 211.

fore, is not the trustee's right to occupy the premises but his liability to pay rent.

The legislation, in sections 32(4) and 32(7), makes it clear that the trustee is personally accountable to the landlord for rent so long as he occupies the premises. The imposition of personal liability in this regard serves a salutary purpose. The trustee who is personally liable is unlikely to exercise his right to possession capriciously or to retain possession longer than is absolutely necessary. In this way, the interests of the landlord are safeguarded. By restricting the trustee's personal liability to the value of the debtor's assets, subsection (9) nullifies the effect of the earlier provisions. A claim for occupation rent becomes, essentially, a claim against the bankrupt's estate rather than a claim against the trustee personally.

It appears to us that there are two possible ways in which this problem might be resolved. The first is to stipulate that the trustee is personally liable, regardless of the value of the bankrupt's estate. This is the approach adopted in Alberta and is essentially a restatement of the trustee's liability for occupation rent at common law. This solution, however, is not free of difficulty. There may be many cases in which the trustee cannot practically value the bankrupt's estate unless he takes possession of the premises. The blanket imposition of personal liability might make the trustee reluctant to enter into possession. This in turn would impair his ability to deal with the bankrupt's assets for the benefit of the unsecured creditors.

A second approach, and one which commends itself to us, is to allow the trustee a reasonable period during which he may, with impunity, occupy the premises, but then to impose personal liability for occupation beyond that time. During the "grace period," the trustee would be obliged to pay occupation rent, but only to the extent of the value of the bankrupt's assets. In this way, the interests of the trustee and landlord are more equitably balanced. The trustee would have the opportunity to value and deal with the debtor's assets, and then to make an informed decision as to whether continued occupation is reasonable in the circumstances. On the other hand, the landlord's potential loss of rental income would be minimized.

How long is reasonable for a "grace period" such as that described above? Any fixed period would, of course, be largely arbitrary, since what is reasonable will depend on the size and nature

of the bankrupt's estate. In the interests of certainty, however, it is desirable that legislation should specify some time limit. What should it be? Our correspondent has suggested seven days. That seems unduly short. In many cases seven days is not sufficient to allow the trustee to value the assets properly, particularly where security interests or a large inventory are involved. The current legislation provides what is, in essence, a three month grace period and this strikes us an inordinate length of time for this purpose, given the potential prejudice to the landlord.

A one month grace period would, we believe, constitute an appropriate compromise. It is our recommendation that the personal liability of the trustee in bankruptcy should be limited for that period only and should be unlimited with respect to continued occupancy of the premises once the period has expired.

### 5. The Trustee's Use Of The Premises: "Bankruptcy Sales"

One use the trustee may wish to make of the premises while he exercises his right to "hold and retain" it under section 32(2) is to conduct what is usually referred to as a "bankruptcy sale." Such sales are usually well-advertized and well-attended by members of the public who see an opportunity to acquire goods at bargain prices. As a general rule, such sales are regarded as consistent with the trustee's right to occupy the premises for the benefit of the trust estate.[55]

But not all landlords are happy to see the premises used in this way. The premises may be part of a larger shopping complex which the landlord has gone to great lengths to promote as having an air of "exclusivity" about it. A bankruptcy sale may be wholly inconsistent with the character being promoted, both in the kind of buyers the sale may attract, and in the appearance of the premises during the sale.[56] Such a sale may also provide legitimate grounds for complaint on the part of other tenants within the complex. To forestall this possibility, some landlords adopt a policy of ensuring that tenancy agreements contain a provision which expressly prohibits the conduct of a bankruptcy sale or a closing-out sale on the premises.

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55. *New Regina Trading Co.* v. *Canadian Credit Men's Trust Association*, (1933) 15 C.B.R. 207 (S.C.C.).
56. Garish yellow and black signs seem to be the norm on these occasions.

What is the status of a provision like that described above? Can it be enforced against the trustee who occupies the premises under section 32(2)? The answer is not clear. The wording of section 32(2) suggests that the trustee is bound by such a provision. In at least one Ontario case, however, it was held that the trustee is not bound by such a provision.[57] We believe this is an issue which calls for clarification.

To enforce such a covenant against a trustee would undoubtedly impair his function to a degree, with a consequent loss to the creditors of the bankrupt estate. This suggests that the covenant ought not to be enforceable. On the other hand, the landlord and other tenants have a clear and legitimate interest in seeing that it is enforced.

The ability of a trustee to conduct a bankruptcy sale on the premises in violation of a provision of the tenancy agreement was considered by the Ontario Law Reform Commission. It concluded that the trustee should be bound by such a provision:[58]

> There would appear to be a conflict between the interest of the creditors in having the rented premises used for the purpose of selling estate assets, and the interest of the landlord, who may suffer damage because of the way in which such sales are usually carried out. The possible prejudice to the landlord's interest is emphasized by the fact that the type of conduct engaged in by the trustee could not have been engaged in by the tenant. In addition, other tenants of the landlord may have their businesses affected by the continued occupation of a trustee for the purpose of realizing assets....
>
> The interest of creditors should not be given such precedence as to enable the trustee to ignore the terms of the agreement. It may be that because of certain onerous provisions in the tenancy agreement the trustee will forego the right to dispose of assets from the rented premises. The trustee may, however, still sell the assets in bulk or arrange for their sale at premises especially rented for that purpose.

We agree with the conclusions of the Ontario Law Reform Commission and recommend that any new provision that replaces section 32 should clearly state that these covenants are enforceable against the trustee.

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57. *In re Crystal*, (1926) 7 C.B.R. 345 (Ont. S.C.). Unlike the situation in British Columbia, however, a trustee under the Ontario legislation is not bound by the tenancy agreement until he elects to retain it: *Landlord and Tenant Act*, R.S.O. 1980, c. 232, s. 38(2).
58. Ontario Law Reform Commission, *Report on Landlord and Tenant Law* (1976) 67.

### 6. Residential Tenancies

Section 32 is one of the few provisions of the *Commercial Tenancy Act* which is expressly stated to apply to residential tenancies.[59] A revised provision designed to replace section 32 should also govern residential tenancies.

59. *Residential Tenancy Act*, S.B.C. 1984, c. 15, s. 46(1).

## A. Introduction

The *Commercial Tenancy Act* is basically remedial and some of its provisions, or matters raised by a consideration of it, concern relatively narrow and, in some cases, obscure issues. We have identified several such issues which do not fit comfortably into any of the earlier chapters. This Chapter is, therefore, something of a "catch-all" designed to provide a home for them.

## B. Distress

### 1. Introduction

#### *(a) What is Distress?*

The word "distress" is misleading. Its common usage conveys notions of pain, discomfort and anxiety. In law, however, distress is a term of art and refers to a particular method of enforcing a right. A definition cited in Halsbury describes it in the following terms:[1]

> A distress is the taking of a personal chattel, without legal process, from the possession of a wrongdoer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand.

This remedy is not universally available to enforce every duty or demand. Distress is an exception to a more general legal policy that precludes remedies against property except under due process of law. Therefore, the person seeking to exercise the remedy of distress (to distrain) must demonstrate that the right sought to be enforced falls within one of the categories for which the law permits this exceptional remedy.

The right of a landlord to seize the goods of his tenant to enforce the payment of arrears of rent is the most familiar example of distress.[2] This right arises at common law and is of great antiquity.

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1. 13 Halsbury (4th ed.) para. 201, n.1 citing Bradby, *Law of Distresses* (2nd ed.) 1.
2. *Ibid.*, at para. 202.

### *(b) Previous Work of the Commission: Report on Distress for Rent*

The landlord's right of distress was the subject of a Report submitted by this Commission in 1981.[3] That Report undertook a comprehensive review of the landlord's right of distress and summarized the Commission's general conclusions and recommendations as follows:[4]

> The origins and features [of distress] ... are to be found in a body of common law developed over several centuries and in a number of Provincial enactments, the principal one being the *Rent Distress Act*. This body of law is badly in need of reform.
>
> The common law aspects of distress are complex, highly refined and little understood. The *Rent Distress Act* is no less archaic. Parts of it are based on English legislation enacted as early as 1689 and reflect the language and concepts of that age. The whole of this body of law is badly out of touch with modern needs and practices.
>
> In this Report we recommend legislation which restates the law of distress in a new and modern form, and provides needed protection to the interests of tenants and third parties while still providing a remedy which meets the legitimate expectations of commercial landlords.

The *Rent Distress Act*[5] referred to would, under the recommendations made in the Report, be replaced by legislation that restates the landlord's right as one similar to a security interest created by agreement between the parties.

The *Rent Distress Act* is not the only provincial statute that regulates or touches on rights of distress. Several provisions of the *Commercial Tenancy Act* also deal with this subject matter.

## 2. The Distress Provisions Of The Commercial Tenancy Act

### *(a) Section 1*

Section 1 of the *Commercial Tenancy Act* sets out a priority rule to govern a competition between a distraining landlord and an execution creditor. It provides:

> 1. No chattels being in or on any land which is or shall be leased for life or lives, term of years, or at will, or otherwise, are liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out, before the removal of such chattels from the premises, by virtue of such execution or extent, pays to the landlord of the premises or his bailiff such sum of

3. Law Reform Commission of British Columbia, *Report on Distress for Rent* (LRC 53, 1981).
4. *Ibid.*, at 5.
5. R.S.B.C. 1979, c. 362.

> money as is due for rent for the premises at the time of the taking of the chattels by virtue of the execution, if the arrears of rent do not amount to more than one year's rent; and in case the said arrears exceed one year's rent, then the party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done heretofore; and the sheriff or other officer is empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

The effect of this section is to limit the landlord's priority to one year's arrears of rent.

In the *Report on Distress* it was pointed out an odd result that could arise through the application of this section:[6]

> This priority structure raises the possibility of "circular priorities" in certain situations. Such a situation might arise if a tenant's goods had been seized by an execution creditor, those goods being subject to a security interest in favour of a mortgagee, and the landlord seeks to assert a right of distress for rent in excess of one year. On these facts, the mortgagee would assert priority over the execution creditor by virtue of his security agreement, the landlord would assert priority over the mortgagee under section 4(1)(b) of the *Rent Distress Act* and the execution creditor would assert priority over the landlord under section 1 of the *Commercial Tenancy Act*.

In that Report it was recommended that section 1 be repealed. We adhere to our earlier conclusion and do not propose that the policy of section 1 be carried forward in new legislation.[7]

*(b) Sections 3 and 4*

At common law the landlord lost his right to distrain for arrears of rent on the termination of a tenancy, even where the tenant continued in possession of the premises. This rule has been altered by sections 3 and 4 of the *Commercial Tenancy Act*. They provide:

> **3.** Any person having any rent in arrear or due on any lease for life or lives, or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said respective leases, in the same manner as he might have done if such lease or leases had not been ended or determined.
>
> **4.** Distress under section 3 shall be made within the space of 6 calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

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6. *Supra*, n. 3 at 17.
7. A consequential amendment to the *Rent Distress Act* arising out of the new *Personal Property Security Act*, S.B.C. 1989, c. 36, s. 126, will, when it comes into force, slightly alter the priorities described above. If the mortgage creates a "purchase money security interest," the mortgagee will be entitled to priority over the distraining landlord. Our conclusions respecting the repeal of s. 1 of the *Commercial Tenancy Act* are not affected by this change.

Distress can therefore be levied against an overholding tenant for six months after the termination of the original tenancy.

These provisions create a technical difficulty where a distress is made coincidental with, or as part of, a termination of the tenancy by the landlord through his retaking possession of the premises. In such a case, retaking the premises may simply involve putting a padlock on the door. But section 4 permits distress only when the tenant remains in possession and this is inconsistent with "padlocking" the premises. In the result, the landlord must exercise great caution in the order in which he asserts his rights. He must distrain first and padlock the premises second. If the order of those steps is reversed -- even though they may only be minutes apart -- the distress is unlawful.

In the *Report on Distress* it was concluded that this rule was an anachronistic technicality which placed landlords in needless jeopardy. It was recommended that section 4 be amended by striking out the words "and during the possession of the tenant from whom the arrears became due." The effect of this amendment would be to make the order in which the landlord asserts his rights irrelevant.

We adhere to that conclusion and believe the policy of these provisions should be carried forward. We do not, however, think they should form part of a new *Commercial Tenancy Act*. Rather they should be consolidated either with the existing *Rent Distress Act* or with the new legislation on that matter recommended in the 1981 Report.

*(c) Section 7*

Section 7 of the *Commercial Tenancy Act* provides:

> 7. Every person shall and may have the like remedy by distress and by impounding and selling the same, in cases of rentseck, rents of assize, and chief rents, as in case of rents reserved on lease, any law or usage to the contrary notwithstanding.

This provision has little or no relevance to modern landlord and tenant law. The three types of rent referred to are all obsolete. "Rentseck" was rent reserved in a deed "but without any clause of distress."[8] "Rents of assize" and "chief rents" were both associated with the manorial system of landholding in England. Neither carried any rights of distress.[9] Section 7 was intended to

8. 2 Bl. Comm. 42.
9. The right to distrain was not an incident of copyhold tenure.

provide rights of distress to the persons to whom such rents were payable.

There is no need to retain section 7 so far as it concerns chief rents and rents of assize. They have no relevance to any past or present system of land tenure in British Columbia. Nor does rentseck play any role in contemporary commercial tenancies. It is our conclusion that a provision similar to section 7 need not be carried forward into new legislation.

### 3. Conclusions

A new *Commercial Tenancy Act* should not contain any provisions relating to distress. Sections 3 and 4 of the current act should be retained in modified form as part of the *Rent Distress Act*, either as it presently exists or in the version recommended in the *Report on Distress*.[10]

## C. The Overholding Tenant

### 1. Introduction

Issues frequently arise concerning the legal position of landlord and tenant when the latter continues in occupation of the rented premises after the termination of his tenancy. A tenant in this position is said to be "overholding."

The legal consequences of overholding by a tenant may depend on the way in which the tenancy was terminated and whether the overholding is adverse to the wishes of the landlord. Several situations are possible. Some tenancies are periodic and continue from month-to-month or from year-to-year. A periodic tenancy is usually terminated by either the landlord or the tenant giving the other notice. Other tenancies simply terminate through the effluxion of time, for example where the lease for a specified number of years expires.

Notwithstanding the termination of his tenancy, the tenant sometimes continues in possession. Frequently this is done with the blessing of the landlord. A lease will often expire while the parties are actively negotiating its renewal and it is contemplated by them that the "overholding" is temporary. On the other

10. *See* s. 3 of the draft *Tenancy Laws Amendment Act* in Chapter X.

hand it may be against the wishes of the landlord who may even have a new tenant waiting to take possession.

### 2. Penal Provisions: Sections 15 And 16

It is against the kind of fact patterns outlined above that sections 15 and 16 of the *Commercial Tenancy Act* are to be read. Section 15 provides:

> **15.** In case any tenant for any term of life, lives, or years or other person who comes into possession of any land by, from, or under, or by collusion with the tenant, wilfully holds over any land after the determination of any such term, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or reversion of such land belongs, or his agent thereunto lawfully authorized, then and in such case the person so holding over shall, for and during the time he holds over or keeps the person entitled out of possession of the land pay to the person kept out of possession, his personal representatives or assignees, at the rate of double the yearly value of the land so detained, for so long time as the same are detained, to be recovered in any court of competent jurisdiction.

This section applies to the overholding by a tenant following the termination of a lease for a term. The landlord is entitled to "double the yearly value of the land" so long as he is kept out of possession.

It is important to note some limitations of section 15. First, the double value penalty does not accrue as a matter of course. The landlord must make a written demand for possession in order to trigger it. Thus, where the parties are *bona fide* negotiating a renewal it is unlikely to be invoked. Case law suggests that only a deliberate disregard for the landlord's rights will lead to double rent. "Wilful" or "contumacious" behavior is required.[11]

Section 16 permits the recovery of double rent where a periodic tenancy has been terminated by notice from the tenant:

> **16.** In case any tenant gives notice of his intention to quit the premises by him holden at a time mentioned in the notice, and does not deliver up possession thereof at such time, then the tenant or his personal representatives shall thenceforward pay to the landlord double the rent or sum which he shall otherwise have paid; to be levied and recovered at the same times and in the same manner as the single rent or sum before giving such notice could be levied or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall so continue in possession.

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11. Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 13:7:2.

Neither section 15 nor 16 appears to provide a penalty where a periodic tenancy has been terminated by a notice from the landlord and the tenant fails to give up possession.

### 3. Common Law Rights

Sections 15 and 16 are not exhaustive of the landlord's rights against an overholding tenant. Whether or not he is entitled to double value or double rent, the common law appears to permit an action for compensation for "use and occupation" for the period of the overholding.[12] The common law position has been described as follows:[13]

> We have now to consider the case of a relation of landlord and tenant existing without any arrangement at all for the payment of rent properly so called, and the case in which the law implies from the conduct of the parties a promise to compensate the landlord for his loss by reason of the tenant's occupation of his premises. The action which can in such case be maintained is not to recover rent, but damages due on an implied agreement to pay for the use of the landlord's property, and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant.

Thus, the landlord's claim against an overholding tenant is, technically, one for damages.[14]

In some Canadian jurisdictions the right to compensation for use and occupation has been restated in legislation.[15] The Alberta statute permits:[16]

> (c) recovery of compensation for the use and occupation of premises by the overholding tenant after the tenancy has expired or been terminated.

The legislation goes on to provide that the landlord's acceptance of such compensation from the tenant does not operate as a waiver of a notice terminating the tenancy, or to create a new tenancy, unless the parties agree.[17]

### 4. Conclusion

We believe that the landlord's rights with respect to the overholding tenant should be put on a modern legal footing. It

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12. *Ibid.*, para. 13:8.
13. Blundell and Wellings, *Woodfall's Law of Landlord and Tenant* (7th ed., 1968) 437.
14. Compensation for use and occupation is not restricted to an overholding. It is available for example in the circumstances contemplated by s. 9 of the *Commercial Tenancy Act*. That provision characterized such compensation as "damages."
15. *See* Rhodes, *supra*, n. 11, para. 13:6:3.
16. *Landlord and Tenant Act*, R.S.A. 1980, c. L-6, s. 20(c).
17. *Ibid.*, s. 22.

follows that sections 15 and 16 should not be retained. The double rent remedy which both provisions embody is essentially penal in character. It represents an approach to the enforcement of private rights which is disappearing from the statute book [18]and which we have recommended be abolished in other contexts.[19] It is our conclusion that sections 15 and 16 should not be carried forward into new legislation.

This conclusion does not, however, imply a view that the landlord's compensation should be confined to the value of use and occupation in all cases. A failure to receive vacant possession of the rented premises when expected may involve the landlord in costs or liability much greater than the rent at stake - greater even than double rent. The obvious example is where the landlord is under an obligation to make the premises available to an incoming tenant or to a purchaser. His inability to do so may result in liability to a third party. In such a case, the landlord may assert a claim over against the tenant.[20] Another possibility is that the overholding might cause the landlord to lose the prospective sale or re-letting with a consequent loss of profit. The status of losses such as these have not been the subject of any reported cases we have been able to discover, but it is difficult to see any reason why, in principle, the landlord should not be able to claim them.

We believe that a new *Commercial Tenancy Act* should contain provisions which embody a legislative restatement and confirmation of:

a. the landlord's right to compensation for use and occupation from an overholding tenant, and

b. the landlord's right to claim over against the overholding tenant with respect to liability to any third party resulting from the landlord's inability to deliver vacant possession.[21]

Compensation or indemnity will not, of course, be the only relief the landlord will wish to claim against an overholding tenant. It will be of equal or greater importance to the landlord that

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18. For example, in 1987 the provision of the *Fraudulent Conveyance Act* which formerly permitted a *qui tam* action was repealed. *See* R.S.B.C. 1979, c. 142, s. 2 repealed by S.B.C. 1987, c. 43, s. 32.
19. For example, triple damages for pound breach under s. 10 of the *Rent Distress Act*, R.S.B.C. 1979, c. 362. *See Report on Distress for Rent, supra*, n. 3.
20. Rhodes, *supra*, n. 11, para. 3:10:3.
21. This recommendation is implemented in s. 12 of the draft legislation in Chapter X.

he regain possession of the premises. The procedures and remedies he might invoke are discussed in Chapter IX.

## D. Tenant for Life

The duration of the tenant's interest under a tenancy agreement may be measured or specified in a number of ways. One familiar technique is to stipulate the duration or term of the tenancy in the tenancy agreement. Thus one might have a lease of premises for five years. Alternatively, the parties might enter into a periodic tenancy which runs from month-to-month or from year-to-year and which is terminated on notice given by one party to the other.

Much less familiar, and almost unheard of today, is the tenancy whose duration is measured with reference to a person's lifetime. Frequently, but not always, that person is the landlord or someone through whom the landlord has derived his interest. A tenancy may also be created which is stipulated to endure for the life of the tenant. The tenant under such an arrangement is sometimes called the "tenant for life." This terminology is unfortunate because such a tenant is easily confused with the holder of a legal life interest, created by a conveyance, will or settlement of the legal estate in the form "to A for life, remainder to B." Such a person is called the "life tenant."[22] Although the two expressions are sometimes used interchangeably, our usage will conform to the explanation given above.

Why would parties choose to define the term of a tenancy with reference to the life of a person when other techniques are available? The choice of this form of tenancy, in many cases, probably reflected the fact that the landlord was a life tenant and in creating a tenancy for (his) life it was for the longest term he could give. A lease for a term of years is not suitable when the landlord is a life tenant and may die before the end of the term.[23]

The tenancy for life has fallen into disuse and is rarely encountered today. One reason is that legal life interests of any kind are seldom created today. They, and the strict settlement so often associated with them, are no longer part of modern estate

22. The person who acquires the interest of a life tenant is said to hold an "estate *pur autre vie*": Litt., 56; Co. Litt., 41b.

23. At common law a life tenant could not make leases to continue for longer than his own life: *Adams* v. *Gibney*, (1830) 6 Bing. 656, 130 E.R. 1434 (Comm. Pleas.).

planning. Where it is thought desirable to create a life interest it is now more usual to create it in the form of a beneficial interest and to place it in a trust. This gives more flexibility and avoids many of the highly technical rules that might otherwise apply. Moreover, the inability of a life tenant to create leases that might outlast his own life was altered by legislation many years ago. Since the middle of the last century, under a variety of enactments concerning settled estates, life tenants were permitted to create valid leases for up to 21 years which were binding on the holders of successive interests.[24]

The legal position of the tenant for life is the subject of three provisions of the *Commercial Tenancy Act*. Their inclusion reflects some of the problems associated with this form of tenancy. Two of these provisions concern apportionment on the termination of a tenancy for life. They are discussed in Chapter VIII. The other provision is section 2. It provides that:

> Any person having any rent in arrear or due on any lease or demise for life or lives may recover such arrears of rent by action as if such rent were due and reserved on a lease for years.

The reason for the existence of this section is explained by the preamble to its English predecessor:[25]

> And whereas no action of debt lies against a tenant for life or lives for any arrears of rent during the continuance of such estate for life or lives. Be it enacted ...

Why no action lay for arrears of rent in those circumstances is uncertain.

The necessity for section 2, which makes rent due on a lease or demise for life recoverable as if it were due on a lease for years, is far from clear. It would be very surprising if a British Columbia court felt constrained to apply a highly technical and manifestly unfair rule of the common law after it had ceased to be part of the law almost 300 years ago. We believe section 2 can safely be omitted from a new *Commercial Tenancy Act*. This view is reinforced by the fact that similar legislation has not been widely adopted in Canada. In any event, our draft contains a general statement as to the right of a landlord to recover arrears of rent.[26] That should be sufficient to satisfy any lingering doubts.

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24. *See* Law Reform Commission of British Columbia, *Report on the Land (Settled Estate) Act* (LRC 99, 1988).
25. *Landlord and Tenant Act*, 1709, 8 Anne, c. 18, s. 4.
26. *See* s. 14(b)(i) of the draft legislation in Chapter X.

## E. Relief from Forfeiture

### 1. Introduction

When a tenant breaches a provision of a lease he may forfeit his right to the tenancy and give the landlord a right of re-entry. This will not occur on the breach of any provision. The landlord will have a right of re-entry only in three cases:[27] where the provision that is breached is a condition;[28] where a right of re-entry is clearly attached to a provision; and where a right of re-entry is conferred by statute.[29]

Historically, courts have been reluctant to give effect to forfeitures:[30]

> The authorities seem to be to the effect that the courts do not look with favour upon forfeitures, and will take advantage of even trifling reasons to avoid upholding them.

British Columbia courts derive, from two sources, authority to grant to a tenant relief against a forfeiture.[31] The first is the equitable jurisdiction of the Court of Chancery which is now vested in the Supreme Court. The second is sections 21 to 24 of the *Law and Equity Act*.[32]

### 2. Law And Equity Act: Section 21

Canadian legislation conferring a general power to relieve against penalties and forfeitures has tended to follow two different models.[33] One is based on the English *Conveyancing Act, 1881*[34] and has been adopted in seven provinces and territories.[35] It provides for relief only with respect to a forfeiture arising out of the landlord-tenant relationship. The other legislative model addresses forfeitures generally and does not single out any particular context in which they might arise. This approach is based

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27. Rhodes, *supra*, n. 11, para. 12:7.
28. A "condition," that is a provision giving a landlord an automatic right of re-entry without words to that effect in the lease, is commonly established by the phrases "provided always" or "on condition."
29. *See, e.g.*, s. 5 of the draft legislation in Chapter X.
30. *Big Valley Collieries, Ltd.* v. *MacKinnon and Consumers' Cooperative Co.*, (1915) 9 W.W.R. 4 (Alta. S.C.) *per* Hyndman J. *See also Peking Palace Ltd.* v. *Trizec Construction Ltd.*, (1988) 20 B.C.L.R. (2d) 161 (C.A.).
31. Rhodes, *supra*, n. 11, at para. 12:11:1.
32. R.S.B.C. 1979, c. 224. There are no specific provisions in the *Commercial Tenancy Act* which afford tenants relief against forfeiture.
33. *See generally* Rhodes, *supra*, n. 31.
34. 44 & 45 Vict., c. 41.
35. (R.S.N.B. 1973, c. L-1, s. 14; R.S.O. 1980, c. 232, s. 20; R.S.P.E.I. 1974, c. L-7, s. 15; R.S.S. 1978, c. L-6, ss. 10, 11; R.O.N.W.T. 1974, c. L-2, s. 46; R.O.Y.T. 1971, c. L-2, s. 58).

on a provision of the 1886 Ontario *Judicature Act*.[36] It has also been adopted in a number of provinces[37] including some which have also adopted legislation based on the other model.[38]

The British Columbia legislation is based on the Ontario legislation of 1886. It is contained in section 21 of the *Law and Equity Act*:

> **21.** The court may relieve against all penalties and forfeitures, and in granting the relief impose any terms as to costs, expenses, damages, compensations and all other matters the court thinks fit.

This provision was first enacted in British Columbia as part of the 1897 revised statutes.[39] Apart from statute, the courts would grant relief from forfeiture only for non-payment of rent or in cases involving fraud, accident, surprise or mistake.[40]

The power given to the court by section 21 is extensive. When it is properly invoked, the sole question for the court is whether it would be just and equitable to grant relief in the circumstances of the particular case.[41] It has been held, however, that section 21 does not give the court any new power.[42] Rather, it restates a power which the Court of Chancery always possessed but exercised sparingly.

Although the courts are still loathe to uphold a forfeiture, they are also reluctant to interfere with freedom of contract. Thus, the case law tends to draw a distinction between major breaches,[43] where relief will be denied, and less serious breaches where relief may be available. Included in the latter category

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36. S.O. 1886, c. 16, s. 38. England has no similar statute.

37. R.S.A. 1980, c. J-1, s. 10; R.S.B.C. 1979, c. 224, s. 21; R.S.M. 1970, c. C280, s. 63; R.S.N.B. 1973, c. J-2, s. 26; R.S.S. 1978, c. Q-1, s. 44; R.O.N.W.T. 1974, c. J-1, s. 18; R.O.Y.T. 1971, c. J-1, s. 8.

38. That is, N.B., Sask., Man., Ont., N.W.T. and Y.T. This has led to some uncertainty concerning the relationship between the provisions. *See* Rhodes, *supra*, n. 11, para. 12:11:7 at 12-79.

39. *See Supreme Court Act*, R.S.B.C. 1897, c. 56, s. 16(7).

40. *Barrow* v. *Issacs & Son*, [1891] 1 Q.B. 417, 420 (C.A.); *Huntting* v. *MacAdam*, (1907) 13 B.C.R. 426, 441 (C.A.). *See also* Rhodes, *supra*, n. 11, para. 12:11:2.

41. *Hallson* v. *McIvor*, (1954) 14 W.W.R. 231 (Sask. C.A.). The discretion of the court to impose conditions is unfettered: *Hallson* v. *McIvor*, *ibid.*, at 235; *Nuytten and Bakalaryk* v. *Stein*, (1954) 12 W.W.R. (N.S.) 465, 471-2 (B.C.S.C.). But regard should be given to "proper principles of judicial discretion": *ibid.* The only limit on s. 21 is that it does not empower the court to relieve against statutory penalties and forfeitures: *R.* v. *Can. Nor. Ry.*, 64 S.C.R. 264, *aff'd.* [1923] A.C. 714 (P.C.); *Martin Mine Ltd.* v. *R.*, (1985) 62 B.C.L.R. 107 (C.A.). *See also Morris* v. *The Queen*, (1977) 3 B.C.L.R. 240 (S.C.). In the latter case, the court drew a distinction between forfeitures imposed for a clearly defined legislative purpose and provisions in a statutory lease, providing for forfeiture on non-payment of rent. It held that relief could be granted against "statutory forfeiture" where the forfeiture relates to a contract between the Crown and a subject. This distinction has been made in subsequent cases: *see, e.g., Magnussen* v. *I.C.B.C.*, (1978) 6 B.C.L.R. 193 (Co. Ct.); *Trans-West Developments Ltd.* v. *City of Nanaimo*, (1979) 17 B.C.L.R. 307 (S.C.).

42. *Emerald Christmas Tree Co.* v. *Boel & Sons*, (1979) 13 B.C.L.R. 122 (C.A.).

43. The B.C. Court of Appeal recently suggested that the courts will not grant relief where the parties have agreed that a "fundamental" provision will lead to a forfeiture: *Pam-Cor Investments Ltd.* v. *Friends and Neighbours Family Restaurants Ltd.*, (1987) 12 B.C.L.R. (2d) 387.

would be late payment of rent, especially where little hardship has been caused and the tenant is willing to compensate the landlord with interest.[44]

### 3. Law And Equity Act: Sections 22 To 24

It is a matter of concern to both landlords and mortgage lenders that property in which they have a financial interest, but not possession, be properly insured. Therefore, a familiar provision in both leases and mortgages is a promise by the tenant or the mortgagor that appropriate insurance will be placed on the property. A failure to do so, or allowing insurance to lapse, is a default which may give rise to a forfeiture. But such a default may occur inadvertently and to avoid injustice in those circumstances certain provisions of the *Law of Property Amendment Act, 1859*,[45] popularly known as *Lord St. Leonard's Act*, were enacted in England.

Sections 22 to 24 of the *Law and Equity Act* are based on those provisions:

> **22.** The court or any judge of it may relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened and the breach has, in the opinion of the court, been committed through accident, mistake or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court or judge in conformity with the covenant to insure, on terms the court or judge may think fit.
>
> **23.** The court or a judge of it, where relief is granted, shall direct a record of the relief having been granted to be made by endorsement on the lease or otherwise.
>
> **24.** The court or judge does not have power under this Act to relieve the same person more than once in respect of the same covenant or condition, nor does it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought has been already waived out of court in favour of the person seeking the relief.

Section 22 is self-explanatory. There has, however, been little judicial consideration of it in this province which suggests that its main utility is to persuade landlords to act reasonably and allow a tenant to reinstate the tenancy when a lapse in insurance coverage has occurred, without recourse to litigation.[46]

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44. *Corynthian Restaurants Ltd.* v. *Phaneuf (No. 1)*, (1981) 11 Sask. R. 83 (Q.B.).
45. 22 & 23 Vict., c. 35, ss. 4 to 6.
46. *See also* s. 20 of the *Law and Equity Act*, R.S.B.C., 1979, c. 224, which concerns rights where the insurance coverage is not in conformity with the lease or mortgage.

Section 24, on its face, imposes a serious limitation on the power of the court to relieve against forfeiture. The court is prohibited from granting relief more than once to the same person with respect to the same covenant. We believe that there are three important points to be made with respect to this provision.

First, the way that section 24 was integrated into the *Law and Equity Act* and its predecessors is unfortunate. The words "under this Act," in section 24, extend the limitation it imposes to relief under section 21 which allows the court to relieve from any kind of forfeiture. Where the same words were originally used in section 6 of *Lord St. Leonard's Act* they only restricted the court's power under section 4 which concerned relief from a failure to insure. In other words, if the scope of section 24 was to be as originally intended, the words "under this Act" should be replaced by "under section 22." A drafting accident gave section 24 a much longer reach than it was ever intended to have.

Second, British Columbia is the only province to have adopted this limitation on relief under *Lord St. Leonard's Act*. Both Alberta and Saskatchewan excluded the limitation when re-enacting this law.[47] It was repealed in the United Kingdom over a century ago.[48]

Third, our research has revealed no British Columbia case in which section 24 has been relied on to deny relief to a tenant or mortgagor. In fact, the provision is seldom referred to in the cases at all.

Our conclusion is that section 24 should be repealed. In theory it is an unjustified limitation on the power of the courts. In practice, it seems to be a dead letter. While its application does transcend landlord and tenant matters, we believe this is as appropriate a context as any to put forward a recommendation to this effect.

If section 24 is to disappear, so must section 23. The only purpose of recording the fact that relief was granted is to enforce the limitation imposed by section 24. Moreover, the requirement that it be recorded on the face of the instrument is difficult to apply in a jurisdiction whose land title system does not always leave such instruments in the possession of the parties.

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47. *See* Rhodes, *supra*, n. 11, para. 12:11:5.
48. *Conveyancing Act, 1881*, 44 & 45 Vict., c. 41, s. 14.

## 4. Conclusion

Historically, the Court of Chancery had the jurisdiction to grant a tenant relief from forfeiture in virtually any circumstance. Section 21 of the *Law and Equity Act* restates this jurisdiction. Although section 21 does not expressly refer to leases or tenancy agreements, the British Columbia courts have applied it to them on numerous occasions.[49] Indeed, they have freely applied the relief against forfeiture decisions from other provinces based on more explicit provisions in their landlord and tenant legislation.[50] As far as we are aware section 21 is working well and we have no suggestions for any improvements in substance.

The only reform issue would, therefore, seem to be one of legislative distribution. In the Working Paper we invited comment on whether it would be desirable to move section 21, so far as it applies to landlord and tenant matters, from the *Law and Equity Act* into new commercial tenancy legislation.[51] None of our correspondents indicated dissatisfaction with the present location of section 21 and we make no recommendation on this question.

So far as sections 22 to 24 are concerned, we have already indicated our view that sections 23 and 24 should be repealed. That leaves section 22. Given the breadth of the court's powers under section 21, it could probably be repealed without harm.[52] However, equally little harm is done by retaining it and we believe that is the appropriate course.

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49. *See* Rhodes, *supra*, n. 11, para. 12:11:6.
50. *See Gleneagle Manor Ltd.* v. *Finn's of Kerrisdale Ltd.*, (1980) 116 D.L.R. (3d) 617, 627 (B.C.S.C.).
51. Working Paper at 110.
52. The courts might, however, draw an inference that they were no longer to have the power to relieve from a forfeiture in the circumstances contemplated by the repealed provision.

## A. What is Apportionment?

The common law rules concerning rent emerged in an agricultural society where rental payments were made out of the profits arising from the harvest on the leased land. To make it possible to realize these profits before paying the rent, the rent did not become due until the last moment of the period to which it related. Consequently, if some event caused the lease to terminate before the rent became due, then no rent was recoverable for the period preceding the terminating event.[1]

The injustice which resulted from this rule was compounded by the fact that rent was usually payable at what today seem like lengthy intervals. Quarterly payments were frequent and payments due only once per annum, or longer, were not uncommon. Moreover, the rule was not confined to rent. It was eventually extended to all periodical payments.[2] Although various exceptions to the rule arose, they served only to complicate the law, rather than to clarify it.[3] There was obviously a need for legislation which would make it possible to "apportion" rent so a particular amount could be identified as representing a given part of a rental period.

## B. The General Apportionment Rule

### 1. Attempts At Reform: England

In 1737 and 1834, Parliament made what were described as "half hearted attempts" to modify the rule, "without much effect."[4] The *Distress for Rent Act, 1737* provided some relief where a tenant for life died by preserving an apportioned claim against any subtenants.[5] This relief, which was of limited application, lives on in British Columbia as section 10 of the *Commercial Tenancy Act*.

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1. *Clun's Case*, (1614) 10 Co. Rep. 127a, 128a, 77 E.R. 1117, 1119 (K.B.). What constitutes a terminating event depends on the terms of the tenancy. The death of a party frequently constituted a terminating event until the 19th century.
2. *Ex parte Smyth*, (1818) 1 Swans. 337, 357, 36 E.R. 412, 414 (Ch.).
3. Holdsworth, *A History of English Law* (2nd ed., 1966) Vol. VII, 270.
4. *Ibid.*
5. 11 Geo. 2, c. 19, s. 15.

Almost a century later, the *Apportionment Act, 1834* was enacted.[6] Its purpose was to extend the application of the *Distress for Rent Act, 1737* and to deal with another problem:[7]

> ...whereas by law, rents, annuities, and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives), whose income is wholly or principally derived from these sources, by the determination thereof before the period of payment arrives are deprived of means to satisfy just demands, and other evils arise from such rents, annuities, and other payments not being apportionable, which evils require remedy...

The Act of 1834 attempted to address this problem by calling for apportionment "according to the time which shall have elapsed" without providing any more specific guidance on the mechanics of apportionment. It was not a success.

Almost 40 years passed before the British Parliament, according to Holdsworth, finally "adopted the right principle,"[8] in the *Apportionment Act, 1870*.[9] It adopted the basic strategy of deeming the various obligations within its scope as accruing from day to day and apportionable in time accordingly.

### 2. The British Columbia Legislation

The civil and criminal laws of England as they existed in 1858 when the colony of British Columbia was founded became part of its law.[10] This meant that the English legislation of 1870 was enacted too late to become part of our "received law." When apportionment legislation was expressly enacted in British Columbia in 1897,[11] the 1870 legislation was ignored, and sections from the 1737 and 1834 statutes were adopted instead, presumably on the basis that they were in force already as received law. With minor changes in wording, these provisions are now found in sections 10 to 13 of the *Commercial Tenancy Act*.

The general apportionment provision of the *Commercial Tenancy Act* is section 12. This section consists of one virtually

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6. 4 & 5 Will. 4, c. 22.
7. *Ibid.*
8. *Supra*, n. 3.
9. 33 & 34, Vict. c. 35.
10. *See Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 2. *See also* Hogg, *Constitutional Law of Canada* (2d ed., 1985) 32.
11. *Landlord and Tenant Act*, R.S.B.C. 1897, c. 110, ss. 26-29.

unreadable sentence almost four hundred words long. A heavily edited version of the section is as follows:[12]

> All...rents...and all other payments...coming due at fixed periods ...shall be apportioned in such manner that on the death of any person interested in any such rents...or other payments...or in the ...fund...from...which the same are...derived,...his personal representatives...shall be entitled to a proportion of such rents... according to the time which has elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of the person or of the determination of his interest, all just allowances and deductions in respect of charges on such rents...and other payments being made; and ...[they] shall have the same remedies for recovering such apportioned parts of the...rents...and other payments, when the entire portion of which such apportioned parts form part becomes due and payable...as...they would have had for recovering such entire rents....

This section appears to establish a broad, if vague, power of apportionment in British Columbia.[13]

Unfortunately, the archaic language of section 12 makes it difficult to construe with any degree of certainty. "Moduses" and "compositions," for example, are mentioned in this section. These terms reflect English ecclesiastical law.[14] The terms "rent service" and "rent-charge" are similarly outdated. The case law is of limited assistance in interpreting section 12. Our research has revealed no instance of section 12 (or of sections 10, 11 or 13) ever having been considered by a British Columbia Court.

While there is a large body of case law interpreting the apportionment legislation of other Canadian provinces, only British Columbia has enacted provisions based on the pre-1870 legislation. In the other provinces which have statutory apportionment provisions, they are based on the English *Apportionment Act, 1870*.[15] The only potentially relevant body of case law is the

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12. *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, s. 12.

13. Situations where the need for apportionment might arise include those where it is necessary to ascertain the amount of income arising: before and after a testator's death; *Re Aspinall*, [1961] Ch. 526; before and after a bankruptcy; *In re Howell; Ex parte Mandleberg*, [1895] 1 Q.B. 844; before and after the assignment of a lease; *Hopkinson* v. *Lovering*, (1883) 11 Q.B.D. 92 and in respect of other similar events and transactions. Subject matter to which the provisions of the 1834 Act have been held to apply include: dividends on shares; *Hartley* v. *Allen*, (1858) 27 L.J. (N.S.) 621 (Ch.); dividends from securities; *Shipperdson* v. *Tower*, (1844) 3 L.T.(O.S.) 199; and profits from business; *Straker* v. *Wilson*, (1871) 6 Ch. App. 503.

14. They refer to agreements between the owners of land and the clergy that the lands be exempted from the obligation to tithe, in consideration of real or pecuniary recompense.

15. The inadvisability of attempting to rely on cases construing dissimilar statutes is illustrated by *Cuthbert* v. *North American Life Assurance Co.*, (1894) 24 O.R. 511 (Ont. H.C.). In that case, Rose J. declined to follow a decision which was based on the 1834 statute, since the provisions of the Ontario legislation based on the *Apportionment Act, 1870* were "entirely different."

English decisions which consider the 1834 Act during the few years it was in force there.[16] Most of this case law is unhelpful.[17]

### 3. Apportionment In Other Jurisdictions

In addition to British Columbia, six Canadian jurisdictions have enacted apportionment provisions.[18] The legislation is virtually identical in all six provinces. All are slightly reworded versions of the English *Apportionment Act, 1870*. These acts replaced the common law rule with a new regime under which rent and other periodic payments became apportionable on a daily basis.

The Ontario *Apportionment Act*[19] is representative of all of the provincial statutes based on the 1870 legislation. Section 1 defines "annuities," "dividends" and "rent" and gives each an extended meaning. Section 3 provides the general mandate for apportionment:

> 3. All rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, shall, like interest on money lent, be considered as accruing from day to day, and are apportionable in respect of time accordingly.

Other provisions deal with points of detail or with apportionment in particular circumstances.[20]

In our research we also canvassed briefly the statutes of Australia, New Zealand and the United States. We found nothing that seemed superior to the Canadian precedents or (with one exception) that embodied an alternative approach. We were im-

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16. This is something of an overstatement. The Queensland *Distress Replevin and Ejectment Act, 1867*, 31 Vic. No. 16, contains provisions that are virtually identical to the apportionment sections of the British Columbia *Commercial Tenancy Act*. We have not examined the case law arising under the Queensland statute.

17. Much of the apportionment litigation under the 1834 legislation arose out of the common law rule that, while personal property devolved upon the executor on death, real estate devolved directly to the heir. This common law distinction has now been abolished in England and in British Columbia. *See* s. 90 of the *Estate Administration Act*, R.S.B.C. 1979, c. 114 and Law Reform Commission of British Columbia, *Report on Obsolete Remedies Against Estate Property: Estate Administration Act, Part 9* (LRC 91, 1987).

18. Newfoundland, Prince Edward Island, Nova Scotia, New Brunswick, Ontario, and Manitoba. The relevant statutes are: The *Apportionment Act*, R.S.N. 1970, c. 11; *Apportionment Act*, R.S.P.E.I. 1974, c. A-12; *Apportionment Act*, R.S.N.S. 1967, c. 10; *Property Act*, R.S.N.B. 1973, c. P-19, ss. 4-8; *Apportionment Act*, R.S.O. 1980, c. 23; and *The Apportionment Act*, R.S.M. 1970, c. A100.

19. *Ibid.*

20. S. 2 deems dividends to accrue by equal daily increment. S. 4 concerns when the apportioned part of any continuing payment is payable. S. 5(1) concerns remedies for recovering apportioned parts. S. 5(2) concerns the recovery of rents by executors or other persons entitled to it. S. 6 provides for two exceptions to the apportionment provisions. Certain insurance proceeds are not apportionable, nor does the act extend to any case in which apportionment is expressly excluded.

pressed, however, with the number of jurisdictions which seem to function perfectly well with no apportionment legislation.

The exception referred to above is the Georgia Civil Code which deals with apportionment in one brief provision:[21]

> Apportionment of a contract, or of rent or hire, may, from peculiar circumstances rendering the common law remedy incomplete, become the subject of equitable jurisdiction.

This legislation seems to adopt an approach to apportionment which simply sanctions the application of restitutionary principles.

#### 4. Analysis

Several flaws in the apportionment provisions of the *Commercial Tenancy Act* have already been noted. First, they are couched in obscure, confusing terms. Second, they are based on English legislation which was effectively abrogated in England more than a century ago, due to its unsuitability. Third, since British Columbia is the only Canadian jurisdiction which has explicitly enacted apportionment legislation based upon the 1834 English legislation, there is a resulting lack of harmony among Canadian jurisdictions.

A further problem is that section 12 is clearly beyond the scope of the *Commercial Tenancy Act*. A person wishing to know the law concerning the apportionment of, say, an annuity would scarcely think to look in a statute concerned with landlord and tenant law.

If it is accepted that the current apportionment provisions are unsatisfactory, a preliminary question might be whether apportionment legislation is necessary at all. Several Canadian provinces and territories have none. Presumably, its absence is not a pressing cause for concern. The lack of any case law interpreting section 12 of the *Commercial Tenancy Act* also suggests that apportionment legislation is not essential. Finally, it may be that apportionment is frequently dealt with by the parties themselves in leases or other agreements under which apportionment may become an issue. This line of argument leads to a conclusion that the apportionment provisions of the *Commercial Tenancy Act* could be safely repealed without replacement.

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21. Ga. Code Ann., s. 37-305.

There are, however, equally convincing arguments in favour of apportionment legislation. A starting point in considering the need for legislation is that apportionment accords with notions of fairness. A party to a tenancy agreement should be neither unduly penalized nor unduly rewarded. It should not be possible for a landlord to retain rent when the tenant has not enjoyed the benefit of the premises; nor should a tenant be able to escape paying rent when he has enjoyed the benefit. The same is true of many other types of recurring obligations to which section 12 applies.

On balance we believe that a legislative statement endorsing apportionment should continue to be part of our law. Having accepted this basic view, the question then becomes one of identifying the legislative technique that will achieve the best results. Legislation might, for example, simply endorse the application of restitutionary principles, leaving the details of apportionment in individual cases in the hands of the court. Statutory guidance would be minimal. This appears to have been the approach taken in Georgia. One objection to such an approach would be its seeming lack of certainty when compared with the more specific statutes. Such uncertainty might be most keenly felt by executors and trustees and others who value clearly defined rules to assist them in the pursuit of their duties.

It is our conclusion that it would be preferable to adopt new apportionment provisions that provide more detailed guidance. The legislation enacted in other provinces seems to be effective and useful which suggests that British Columbia might simply adopt one of the existing legislative models. Adopting provisions based upon the *Apportionment Act, 1870* would increase uniformity among provincial laws, and would import a body of existing case law to aid in the interpretation of new British Columbia legislation. These advantages would, however, be outweighed by a major disadvantage. As might be expected with legislation that is over a century old, the 1870 Act is unnecessarily cumbersome and verbose. We believe the proper course is to draft afresh.[22]

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22. A proposal to this effect in the Working Paper was uncontroversial. One correspondent did query the application of apportionment legislation to wage garnishment. Such legislation has been held to apply in other provinces and no difficulties seem to have arisen. *See Lee* v. *MacDonald*, (1970) 12 D.L.R. (3d) 404 (N.S. Co. Ct.); *Manjuris* v. *Manjuris*, (1981) 127 D.L.R. (3d) 361 (Ont. S.C.). In any event, the question of apportionment is less critical in British Columbia because the *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 4(7), permits the attachment of all wages which become payable within 7 days after the supporting affidavit was sworn.

### 5. Conclusions On A General Apportionment Rule

Apportionment legislation makes it possible to avoid the injustice which resulted from the failure of the common law to permit apportionment. The *Commercial Tenancy Act*, however, is an unsuitable vehicle for such legislation. Many jurisdictions have a separate act devoted to apportionment, but we believe that the *Law and Equity Act*[23] would be a suitable location for apportionment provisions, without the necessity of creating an entirely new act.

The sections of the *Commercial Tenancy Act* dealing with apportionment should be repealed, and the *Law and Equity Act* amended to include apportionment provisions of general application.[24] Our draft legislation reflects this conclusion. The draft adopts the fundamental policy of the 1870 Act, that rent and other periodic obligations accrue and are apportionable on a daily basis.

## C. Apportionment and the Tenancy for Life

Two sections of the *Commercial Tenancy Act* set out special rules respecting apportionment on the termination of a tenancy for life[25] or similar interest.

### 1. Section 10

Section 10 of the *Commercial Tenancy Act* provides:

> 10. Where any tenant for life dies before or on the day on which any rent was reserved or made payable on any demise or lease of any land which determined on the death of the tenant for life, the personal representatives of the tenant for life shall and may recover from any undertenant or undertenants of the land if the tenant for life dies on the day on which the same was made payable, the whole, or if before such day then a proportion, of the rent according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

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23. R.S.B.C. 1979, c. 224.
24. This recommendation is implemented in s. 1(3) of the draft *Tenancy Laws Amendment Act* in Chapter X.
25. A general discussion of the tenancy for life is contained in Chapter VII.

This provision concerns the situation in which the duration of a tenancy for life is measured with reference to the life of the tenant.

It is designed to overcome a difficulty that arose at common law with respect to the apportionment of rent. If a tenant for life, who had created a subtenancy out of his interest, died before the end of a rental period (as provided in the subtenancy agreement), the subtenant's obligation to pay rent ceased. Since there was no provision for apportionment under the common law, the rent for the time preceding the death of the tenant for life was not paid into the estate; it was simply lost. Section 10 modifies this rule by giving the personal representative of the deceased tenant for life a mandate to collect rent for that portion of the rental period which preceded his death.

### 2. Section 11

The English legislation on which section 10 is based was first enacted in 1737.[26] Almost 100 years later, additional legislation[27] now contained in section 11 of the *Commercial Tenancy Act*, extended its operation:

> 11. Rents reserved and made payable on any demise or lease of land determinable on the death of the person making the same (although such person was not strictly tenant for life thereof) or on the death of the life or lives for which the person was entitled to the land, shall, so far as respects the rents reserved by the lease, and the recovery of a proportion thereof by the person granting the same, his or her personal representatives, be considered as within the provisions of section 10.

Thus, the provisions of section 10 are extended to those who are "not strictly tenant for life."[28]

### 3. Tenancy Pur Autre Vie

The need to provide a remedy against the subtenant exists whenever the interest of his immediate landlord terminates on the death of a person. Section 10 provides such a remedy only when the death is that of the subtenant's landlord. Left un-

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26. *Distress for Rent Act, 1737*, 11 Geo. 2, c.19, s. 15.
27. *Apportionment Act, 1834*, 4 & 5 Will. 4, c. 22, s. 1.
28. The types of persons contemplated by this section are suggested by the English *Settled Land Act, 1925*, 15 Geo. 5, c. 18, s. 20 which recognizes ten categories of persons who would have the powers of a tenant for life for the purposes of the statute. These include persons such as the tenant in tail, the tenant by the curtesy and "a married woman entitled to an estate in fee simple or for a term of years absolute subject to a restraint on anticipation." None of these categories are of any current relevance in British Columbia.

touched is the case where that landlord's interest is measured with reference to the lifetime of his landlord or of a third party. This situation is dealt with in Ontario by a provision of the *Landlord and Tenant Act*:[29]

> **42.** A person entitled to any rent or land for the life of another may recover by action or distress the rent due and owing at the time of the death of the person for whose life such rent or land depended as he might have done if the person by whose death the estate in such rent or land determined had continued in life.

This provision is based on English legislation[30] enacted in 1540, which is probably in force in British Columbia by virtue of section 2 of the *Law and Equity Act*.[31]

#### 4. Conclusion

Sections 10 and 11, and legislation comparable to section 42 of the Ontario *Landlord and Tenant Act*,[32] would become redundant if the apportionment provisions of general application, recommended above, are adopted.[33] Their enactment would render unnecessary apportionment provisions directed solely at the tenancy for life and similar interests. Our draft legislation contains no such provisions.

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29. R.S.O. 1980, c. 232, s. 42.
30. *Administration of Estates Act, 1540*, 32 Hen. 8, c. 37, s. 4.
31. *Supra*, n. 23.
32. *Supra*, n. 29.
33. This recommendation is implemented in s. 1(3) of the draft *Tenancy Laws Amendment Act* in Chapter X.

## CHAPTER IX PROCEDURE

### A. Introduction

Previous chapters of this Report have explored various aspects of the classic view of a tenancy -- that at the time the tenancy was created, the landlord conveyed an interest in land to the tenant in return for the "purchase price" of rent. That classic view has shaped the law in a number of ways that, in a modern context, are unsatisfactory.[1] The classic view also affected procedure as well as substance and nowhere is this more clearly revealed than in those provisions of the *Commercial Tenancy Act* which govern the landlord's remedies for recovering possession of the rented premises. They are, as will be seen, relics of a bygone era.

In England, before the 19th century, the common law proceedings for recovery of possession, which were the only ones available to a landlord, were cumbersome and expensive. This led to the enactment of various pieces of legislation which permitted the landlord to recover premises through summary proceedings. In British Columbia, this legislation was adopted almost verbatim. It has been carried forward into the current *Commercial Tenancy Act*.

The Act contains no fewer than three summary procedures. Because they are contained in a statute rather than in *Rules of Court*, they have escaped the modernization and rationalization that other aspects of civil procedure have undergone. Highly technical in nature, they often prove to be something of a minefield to the landlord who attempts to use them. Moreover, the *Rules of Court* appear to render them obsolete. In this Chapter we consider whether the various summary procedure provisions of the Commercial Tenancy Act still serve a useful function. To this end, a brief review of the historical context is necessary.

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1. Although the courts are moving away from a strictly classic view toward a contractual model. *See* Chapter III, *supra*.

## B. Historical Background

### 1. Landlord's Common Law Rights To Recover Possession

The common law procedures for recovering possession of rented property were developed at a time when most tenancies were agricultural in nature. Rent was paid from the profits of the harvest. When crops failed, the tenant was unable to pay. The tenant's response varied with circumstances. Sometimes he abandoned the premises. Sometimes he simply remained on the land without paying the rent. Because the lease was regarded as conveying an interest in land, a breach of one of its terms, such as a failure to pay rent, did not of itself entitle the landlord to resume possession. A right of possession was available only in the circumstances described below.

#### *(a) Termination*

A tenancy terminates when the period for which it was created expires "by effluxion of time."[2] This would include a tenancy created for a term of years or a tenancy created for the lifetime of the landlord, the tenant or some other person. The concept of termination also applies to events which bring an end to a periodic tenancy such as one that runs from year-to-year. Such a tenancy is open-ended in duration, but either party can usually terminate it by an appropriate notice given in accordance with the terms of the tenancy agreement.[3] When a tenancy terminates in any of these ways the landlord has a right to possession.

#### *(b) Forfeiture*

In some cases a tenancy will be void or voidable[4] if a specified event occurs. For example, the tenancy agreement might provide that the tenancy is subject to the condition that "the land is used for farming." If the tenant uses the land for any other purpose, he forfeits the tenancy and the landlord has the right to treat it as at an end,[5] with a corresponding right to reclaim possession of the premises.

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2. Woodfall, *Law of Landlord and Tenant* (10th ed., 1871) 262. *See also* 18 Halsbury (1st ed., 1911) para. 899-936.
3. Woodfall, *supra*, n. 2 at 262.
4. Originally, any provision that upon the happening of a certain event the lease was "void" was construed literally; the lease ceased to exist when the event occurred. Since the 19th century, the courts have construed the word "void" as meaning "voidable," so that the lessor has the choice either to terminate the lease or to waive the forfeiture: Holdsworth, *A History of English Law* (2nd ed., 1937) Vol. VII, 293.
5. Notwithstanding the forfeiture, the lease continues until the landlord does some act which shows his intention to terminate it: Halsbury, *supra*, n. 2, para. 1036.

A condition, which on its breach gives the landlord the right to terminate the tenancy, is to be contrasted with lesser provisions, "mere promises," whose non-performance or breach will not lead to a termination of the tenancy.[6] A simple covenant to pay rent is such a mere promise and the landlord has no right to evict the tenant for breach of that promise. His only remedy at common law is to levy distress or to bring an action for rent.[7]

This distinction was not lost on landlords and it became common for tenancy agreements to be framed so that the non-payment of rent or the bankruptcy of the tenant constituted a breach of condition. That technique was superseded by the practice of including in the tenancy agreement an even more explicit provision which gives the landlord the right to resume possession of the premises, or to bring an action for possession, if the tenant failed to pay rent[8] or observe other covenants. This is the "proviso for re-entry" and it is a common feature of most commercial tenancy agreements today.[9]

*(c) Surrender and Merger*

The tenant's interest may be surrendered or otherwise become merged in the landlord's reversionary interest. These concepts were discussed earlier in this Report.[10] In either case, the original tenancy terminates[11] and the landlord has a right to possession.

**2. Landlord's Common Law Remedies To Recover Possession**

At common law, the landlord could enforce his right to possession in two ways. First, he could use self-help and physically re-enter the property. Alternately, he might take legal proceedings in the form of an action in ejectment.

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6. Cole, *The Law and Practice of Ejectment* (1857) 403.
7. *Ibid.*, at 410-11.
8. Even so, a formal demand of rent in accordance with the strict rules of the common law had to be made before the landlord could re-enter, unless the lease contained express words dispensing with this necessity: Woodfall, *supra*, n. 2 at 291-292. *See also Tom* v. *Shofer*, [1953] 1 D.L.R. 356 (N.S.S.C. App. Div.); *Marshall Steel Ltd.* v. *Johnston Marine Terminals Ltd.*, [1989] B.C.D. Civ. 2344-01 (C.A.). The rent had to be demanded in the precise sum due, on the exact day it was payable (usually on the last day of the lease), at a convenient time before sunset, and upon the land.
9. *See* the proviso for re-entry in the *Land Transfer Form Act*, *infra*, n. 61.
10. *See* Chapter IV, *supra*.
11. Halsbury, *supra*, n. 2, para. 1058-1067.

*(a) Re-Entry*

In some ways, re-entry[12] is the ideal remedy for the landlord whose tenant fails to pay rent or refuses to vacate the premises after the tenancy has terminated. It has the virtue of being relatively quick and cheap.

But this course of action also has its risks. If the landlord misperceives the facts and he has no right to re-enter, he may be liable for damages for trespass and possibly for consequential losses if the re-entry disturbs the tenant's business. He must also be wary of committing assault. Even if his right to re-enter is not in question, he can use only reasonable force to evict a resisting tenant. As one 19th century observer commented:[13]

> If the right of entry be clear and free from all doubt but the tenant in possession is a strong resolute man, or an obstinate litigious person, it is generally more advisable to proceed by ejectment than by entry. It is not easy to turn out such a person and his family and servants and their respective goods and chattels in a legal manner, without being guilty of a breach of the peace, or of any excess of force and violence.

Exercising a right of re-entry so as to cause a real or apprehended breach of the peace is an offence.[14]

A further difficulty with physical re-entry was that it created no authenticating documentation that might be used to satisfy a subsequent purchaser from the landlord that the termination of the tenancy and the re-entry were regular. The absence of such documentation might render the reversion less marketable since a subsequent purchaser might have no assurance that the tenant would not reappear and assert an entitlement to his former estate. This difficulty is present even where the tenant willingly gives up possession or has abandoned the premises.

A final disadvantage of re-entry at common law was that it resolved only the issue of physical possession.[15] Separate proceedings were necessary to recover arrears of rent, damages for

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12. A right of re-entry means the legal right to enter the premises and take actual possession: Cole, *supra*, n. 6 at 66.
13. Cole, *ibid.*, at 70.
14. *Criminal Code*, R.S.C. 1985, c. C-46, s. 72(1), (1.1). The provision contains a general prohibition against forcible entry in circumstances likely to cause a breach of the peace, whether or not the person is entitled to enter. There is a corresponding offence created by s. 72(2). It is "forcible detainer" to, without colour of right, remain in possession of land as against a person legally entitled to possession of it. Prosecutions under these provisions seem to be rare.
15. The moment the party having a right of entry enters on any part of the property for the purpose of taking possession, he becomes legally seised or possessed (according to the nature of his title), and any previous tenants in possession and all other persons, who afterwards remain on the property without his permission and against his will become trespassers: Cole, *supra*, n. 6 at 67.

the tenant's continued use of the property or any other relief to which the landlord might be entitled.

*(b) Ejectment*

The landlord could enforce a right of re-entry by bringing an action of ejectment.[16] This was a complicated proceeding involving the demise of the premises to fictional tenants, Doe and Roe, whose subsequent "ejectment" was enforced by the sheriff. In a most convoluted way, this brought into issue the question of possession of the property between the actual tenant and his landlord.[17]

No damages were recoverable in an action of ejectment. By commencing such proceedings, the landlord elected to treat the tenant as a trespasser. Accordingly, he could not thereafter sue the tenant for rent or compensation for use and occupation. His only remedy was to bring another action[18] in trespass for "mesne profits."[19] The action of ejectment itself was slow, awkward and expensive.

### 3. Statutory Developments

From the landlord's perspective, the law concerning the recovery of possession was deficient in a number of ways. The tenant's non-payment of rent or breach of other terms of the tenancy agreement did not automatically lead to a right to repossess the property. Even where the right existed, or the tenant was wrongfully overholding, the remedies for enforcement were unsatisfactory. A number of developments took place in the 18th and 19th centuries to improve the landlord's position.

The *Distress for Rent Act, 1737*[20] provided, among other things, a summary procedure before justices of the peace for the recovery of land that was abandoned by a tenant in arrears of rent. The *Common Law Procedure Act, 1852*,[21] abolished the

16. *Ibid.* *See Robinson, Little & Co. (Trustees of)* v. *Marlowe Yeoman Ltd.*, (1986) 5 B.C.L.R. (2d) 67 (C.A.).
17. The whole purpose of ejectment was to avoid the use of the "real action" of novel disseisin for trying the issue of title to the land. The procedural advantages of ejectment, which are almost incomprehensible today, ensured that by the start of the 17th century ejectment had become the usual mechanism for claiming land. *See* Milsom, *Historical Foundations of the Common Law* (2nd ed., 1981) 161-163; Holdsworth, *supra*, n. 4, Vol. VII, 4-7.
18. Cole, *supra*, n. 6 at 634.
19. "Mesne profits" are, essentially, compensation for use and occupation of premises from an overholding tenant.
20. 11 Geo. 2, c. 19, ss. 16-17.
21. 15 & 16 Vict., c. 76, ss. 168-209.

many fictions and technical limitations that accompanied the action of ejectment.[22] In 1873, the name of the action of ejectment was changed to "an action for the recovery of land."[23] This is the term now used in British Columbia.

Historically, an action of ejectment could only be brought in a superior court. In 1856, legislation was enacted that allowed the recovery of "small tenements" in County Court.[24] It applied to premises whose value or annual rent did not exceed 50 pounds. The procedure was available for the recovery of possession from an overholding tenant or for non-payment of rent.[25]

The *Common Law Procedure Act, 1852* also contained two special procedures for actions of ejectment by a landlord in specified circumstances. One procedure applied to the recovery of possession from an overholding tenant.[26] The other concerned ejectment for non-payment of rent.[27] The relevant provisions in the *Common Law Procedure Act, 1852* are, in some sense, the predecessors of the procedural provisions of our *Commercial Tenancy Act*. In practice, however, they were superseded over eighty years ago by yet another development.

From the middle of the 19th century, the civil procedure of England allowed proceedings to be commenced by way of a specially endorsed writ for specified types of claim or causes of action.[28] If the plaintiff's claim was one that could be made the subject of a specially endorsed writ, he enjoyed a procedural advantage. He could apply in a summary way to the court and, on veri-

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22. A simple writ claiming the land sought to be recovered was substituted. Another substantive improvement was that the landlord could recover mesne profits in the ejectment proceedings without having to bring a separate action. *See* Rhodes, *Williams and Rhodes Canadian Law of Landlord and Tenant* (5th ed., 1983) para. 13:9:2.

23. *Supreme Court of Judicature Act*, 36 & 37 Vict., c. 66.

24. *County Courts Act*, 19 & 20 Vict., c. 108, ss. 50, 52. This Act was based on (1846) 9 & 10 Vict., c. 95, ss. 122, 123, 126, and 127. In addition, there was a summary procedure for the recovery of land before justices under (1838) 1 & 2 Vict., c. 74, ss. 1-8. It applied to overholding tenants whose rent did not exceed 20 pounds per year. While very similar to the remedy provided by s. 50 of the *County Courts Act*, it was not repealed thereby: Cole, *supra*, n. 6 at 669.

25. Provided that the landlord had a right of re-entry: s. 52.

26. Ss. 213 to 218. These sections substantially re-enacted in *An Act for enabling Landlords more speedily to recover Possession of Lands and Tenements unlawfully held over by Tenants*, (1820) 1 Geo. 4, c. 87. A major advantage of this procedure was that the tenant could be compelled to provide sureties for damages and costs. However, the procedure was only available if the lease was in writing: Cole, *supra*, n. 6 at 378.

27. Ss. 210 to 212. These sections substantially re-enacted *An Act for the more effectual preventing of Frauds committed by Tenants, and for the more easy Recovery of Rents, and Renewal of Leases*, (1731) 4 Geo. 2, c. 28. They permitted an action of ejectment where one-half year's rent was in arrears, there was no sufficient distress, and the landlord had a legal right of re-entry for non-payment of rent. This was an improvement on the common law insofar as no formal demand of rent was necessary before the procedure could be invoked.

28. *Common Law Procedure Act, 1852*, 15 & 16 Vict., c. 76, ss. 25, 27. Specially endorsed writs became part of the English Supreme Court Rules through the *Judicature Acts* of 1873 (36 & 37 Vict., c. 66, Schedule I, R. 7) and 1875 (38 & 39 Vict., c. 77, Schedule I, Order III, R. 6). The first Rules of Court promulgated in British Columbia in 1880 (pursuant to the *Judicature Act*, S.B.C. 1879, s. 17) copied the English Rules of Court in almost every detail, including Order III, R. 6.

fying his own cause of action, was permitted to enter final judgment without proceeding to a trial, if the defendant could not demonstrate any defence to the claim. This procedure was quick and highly convenient.

The legal machinery involving a specially endorsed writ and summary judgment works best in actions where the dispute between the parties is factually simple such as whether or not a debt has been paid. As such, it seems well suited to deal with a landlord's claim for possession based on the non-payment of rent or overholding. Nonetheless, it was not until 1883 that this procedure was finally made available to allow a landlord to recover possession.[29] In that year the English Supreme Court Rules were revised to allow the issuance of a specially endorsed writ for the recovery of land from an overholding tenant. The British Columbia Rules of 1890 followed this revision. In 1902, the English Rules were amended to permit a specially endorsed writ to issue against a tenant who had forfeited the lease for non-payment of rent. The British Columbia Rules were amended accordingly in 1906 and the summary judgment procedure remains available to landlords under the current *Rules of Court*.[30]

## C. The Procedural Provisions of the *Commercial Tenancy Act*

### 1. Introduction

The statutory procedures developed in England in the 18th and 19th centuries were designed to overcome problems associated with land tenure concepts rooted in the feudal system. They were, with few permutations, adopted in British Columbia.[31] The current *Commercial Tenancy Act* contains three summary procedures which the landlord may invoke to recover possession of rented premises.

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29. *See generally*, Halsbury, *supra*, n. 2, para. 1074, fn. (e).
30. The specially endorsed writ for the recovery of possession of land remained available until 1976. In that year the Rules of Court were substantially revised with the result that summary judgment procedure was made available in all cases.
31. *Over-holding Tenants' Act*, S.B.C. 1895, c. 53, and *Landlord and Tenant Act*, R.S.B.C. 1897, c. 110. The 1911 revision of British Columbia statutes consolidated the procedural provisions of these two Acts in essentially their present form: *Landlord and Tenant Act*, R.S.B.C. 1911, c. 126.

### 2. Sections 5 And 6

The procedure described in sections 5 and 6 adopts almost verbatim[32] that set out in the *Distress for Rent Act, 1737*.[33] It is available only if three conditions are satisfied. First, the tenant must hold the land "at a rack-rent, or where the rent reserved is full three-fourths of the yearly value of the demised premises." Second, the rent must be in arrears for one year. Finally, the tenant must have abandoned the premises without leaving sufficient distress.

Section 5 provides that, at the landlord's request, two Justices of the Peace may visit the premises and post a notice. If the tenancy is not brought back into good standing within 14 days, the landlord's right to possession is confirmed and the lease is rendered void.[34] This proceeding is subject to a summary review by the Supreme Court which has a wide discretion as to the order it may make.

### 3. Sections 17 To 27

Sections 17 to 27 provide the landlord with a remedy against an overholding tenant whose lease has expired or has otherwise been determined.[35] Sections 18 to 21 establish a two-stage process for the eviction of the overholding tenant.[36] The first stage requires an application to court[37] to determine, on affidavit evidence, whether the landlord has a *prima facie* right to invoke the procedure. If he has, a court date is set, of which the

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32. The full text of these sections is set out in Appendix A.
33. *Supra*, n. 20.
34. This procedure was originally held to apply only where the landlord had an express right of re-entry under the lease: *Ex parte Pilton*, (1818) 1 B.& Ald. 369, 106 E.R. 136 (K.B.). In 1817, it was extended to leases where no such right had been reserved: *Deserted Tenements Act, 1817*, 57 Geo. 3, c. 52.
35. The full text of these sections is set out in Appendix A. The procedure appears to be based on a combination of ss. 213-218 of the *Common Law Procedure Act, 1852*, *supra*, n. 21, and the *County Courts Act*, (1856) 19 & 20 Vict, c. 108, s. 50, *supra*, n. 24. However, the provisions of the *County Courts Act* were also echoed in British Columbia's *County Courts Act* until 1962: *see County Court Jurisdiction Act*, S.B.C. 1885, c. 7, ss. 31-39; *County Courts Act*, R.S.B.C. 1960, c. 81, ss. 50-59; repealed by S.B.C. 1962, c. 17, s. 3.
36. *Melanson* v. *Cavolo*, (1980) 25 B.C.L.R. 110 (Co. Ct.).
37. S. 18, in its current form provides that the application for an order for possession is brought in a County Court. S. 22 provides that an eviction order may be appealed to the Supreme Court which court may "examine the proceedings and evidence" in the County Court and, if necessary, restore the tenant to possession. In *Czekay* v. *Swanson*, (1951) 3 W.W.R. 228 (B.C. S.C.), it was held that the provisions of s. 22 in effect create an appeal. Further appeal lies to the Court of Appeal: *Mital* v. *Andrews*, [1950] 1 W.W.R. 423, 2 D.L.R. 51 (B.C.C.A.). Ss. 23 and 24 concern costs and witnesses. Ss. 26 and 27 deal with the style of cause and the service of documents in respect of the procedure under these sections.
This will be altered when the merger of the Supreme and County Courts contemplated by the new *Supreme Court Act*, S.B.C. 1989, c. 40 is completed. Consequential amendments vest jurisdiction in respect of the summary procedure in the Supreme Court. Ss. 22 to 24 will be repealed. The amendments are expected to come into force on July 1, 1990.

tenant must be notified. At the inquiry the court determines the issue of title to the premises in a summary fashion.

If the tenant is found to be wrongfully overholding, a writ of possession is issued; otherwise the case must be dismissed. Section 25 provides that the summary procedure does not derogate from any other right or remedy to which the landlord may be entitled. Thus the landlord may, in other proceedings, claim arrears of rent or mesne profits.[38]

These sections are strictly construed.[39] For example, it is a condition precedent to the court's jurisdiction that the lease must be terminated before a written demand for possession can be made.[40] Moreover, the summary procedure is inappropriate in a case involving complicated questions of fact or law. Such issues must be resolved in an ordinary trial.[41]

#### 4. Sections 28 To 31

A further summary eviction procedure is provided by sections 28 to 31.[42] The landlord has a right to apply to court[43] for possession where the tenant is seven days late in paying rent or has breached a fundamental term of the tenancy agreement but refuses, on written demand, to pay the rent or leave the premises.

Again, a two-stage procedure is involved. The first stage involves an application to the registrar of the court for the issuance of a show-cause summons. This application must be supported by an affidavit containing the appropriate averments of fact. The summons brings the matter before the court which summarily determines the parties' rights. If the landlord satisfies the court as to his rights, an order for possession may issue.[44]

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38. There is nothing to prevent the landlord from applying for any remedy given to him by statute or common law: *Re Broom and Goodwin*, (1910) 2 O.W.N. 125, 17 O.W.R. 102.

39. *See, e.g., Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, (1983) 49 B.C.L.R. 26 (Co. Ct.); *2733-4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Claud Loo* v. *Sun Fat*, [1925] 4 D.L.R. 134 (B.C. Co. Ct.); *Sabourin Holdings Ltd.* v. *Rapid Rent-A-Car Ltd.*, [1989] B.C.D. Civ. 2320-01.

40. *Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, *ibid.*

41. *See, e.g., Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, (1983) 49 B.C.L.R. 26 (Co. Ct.); *2733 - 4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Claud Loo* v. *Sun Fat*, [1925] 4 D.L.R. 134 (B.C. Co. Ct.); *Sabourin Holdings Ltd.* v. *Rapid Rent-A-Car Ltd.*, [1989] B.C.D. Civ. 2320-01.

42. The full text of these sections is set out in Appendix A. The procedure under these sections appears to be based on a combination of ss. 210-212 of the *Common Law Procedure Act, 1852*, *supra*, n. 21, and the *County Courts Act*, (1856) 19 & 20 Vict., c. 108, s. 52, *supra*, n. 24. *See also supra*, n. 35.

43. Application is currently made to a county court. The *Supreme Court Act*, S.B.C. 1989, c. 40 will transfer this jurisdiction to the Supreme Court when it comes into force. *See supra*, n. 37.

44. These sections do not entitle the landlord to summary judgment for unpaid rent: *Sherwood* v. *Lewis*, [1939] 2 W.W.R. 49, 54 B.C.R. 72 (Co. Ct.).

The procedures set out in these sections require strict compliance.

## D. Analysis

### 1. The Summary Procedure Provisions Are Archaic

When they were enacted, the summary procedures undoubtedly represented a significant enhancement of the legal position of the landlord who wished to recover the possession of premises. Today they are an anachronism. They are based on a historical view of the tenancy that is increasingly being called into question. They are much more technical and more complex than the general rules of civil procedure that govern other kinds of claims. Finally, the language of some of the provisions is woefully out of date.[45] In short, the summary procedures no longer seem to accomplish their original purpose.

The procedure under sections 5 and 6 will rarely, if ever, be of use to the modern landlord since it can be invoked only if the tenant is in arrear of one year's rent. It is difficult to envisage this circumstance arising in a modern commercial tenancy.

Each of the two procedures available under sections 18 to 31 contemplate a two-stage process. This is awkward and time-consuming. The limited range of issues which may be brought before the court encourages a multiplicity of proceedings. The strict construction given to the provisions make their use hazardous.[46]

One final point underscores the conclusion that the summary procedure provisions are archaic: they can only be invoked by the landlord. A tenant faced with a breach of the tenancy agreement by the landlord must bring an ordinary action to obtain a remedy. While this is no great loss to the tenant in practice, it does illustrate that (in theory at least) the Act does not achieve a fair balance between the interests of landlords and ten-

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45. An example of the difficulties raised by the archaic language of the *Commercial Tenancy Act* is *James and Becker* v. *Yarimi Enterprises Ltd.*, (1984) 57 B.C.L.R. 131 (Co. Ct.). The landlord, seeking an order under s. 18, had attached the exhibits to his affidavit by wrapping an elastic band around them because they were too bulky to be attached by staples. A court application was necessary to decide that the exhibits had been properly "annexed" within the meaning of the Act.

46. The current requirement that proceedings must be brought in a County Court is also at odds with the normal monetary and territorial distribution of jurisdiction among the various court levels. This aspect of the procedure will be rationalized when the merger of the Supreme and county courts is complete. *See supra*, n. 37.

ants so far as remedies and procedure are concerned. The interests of the former are clearly favoured.

### 2. The Summary Procedure Provisions Are Redundant

#### *(a) Internal Redundancy*

In a modern context, it makes little sense to retain three distinct procedures by which the landlord can summarily recover possession of the rented premises. Because many of the concerns which led to the enactment of the different procedures are no longer relevant, such duplication is difficult to justify. Sections 18 to 27 and sections 28 to 31, for example, overlap to such an extent that it has been held that, in some situations, the landlord can elect either procedure.[47]

#### *(b) External Redundancy*

When first enacted, the summary procedures differed so substantially from the normal proceedings in ejectment that it was necessary to spell out the procedural details with great precision. Most of this procedural detail has been carried forward into the current *Commercial Tenancy Act*. These special procedures seem unnecessary today because a superior remedy is available under the *Rules of Court*.

The Rules deal with all procedural matters likely to arise in litigation between landlord and tenant. They also provide summary procedures for obtaining judgment, in appropriate cases, without a full trial. As noted earlier, since the turn of the century landlords have had the ability to issue process under the general rules of court claiming possession of land. Such a claim is one on which summary judgment was,[48] and continues to be,[49]

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47. *Mirasol Farms Ltd.* v. *Lemer (Prelutsky)*, (1978) 6 B.C.L.R. 170, 5 R.P.R. 178 (Co. Ct.).

48. Until 1976 the claim would be made on a specially endorsed writ. *See, e.g.*, Supreme Court Rules, 1961, Order 3, Rule 6(2). Summary judgment would then be claimed under Order 14. The machinery of the specially endorsed writ was intended to prevent vexatious defences and applied only in simple cases: Williston & Rolls, *The Law of Civil Procedure* (1970) vol. 1, 280. If there was a meritorious defence, the application for summary judgment was dismissed and the defendant was given leave to defend the action: Order 14, Rule 1.

49. *See* Rule 18 and Rule 18A. Rule 18 is the summary judgment procedure in its modern form. Rule 18A, introduced in September 1983, is also available in landlord and tenant proceedings. Because Rule 18A is designed to have disputed issues of fact determined expeditiously, the Rule is properly described as a "summary trial procedure" rather than a summary judgment procedure. Judgment may be applied for and must be granted unless the Court is unable on the whole of the evidence before it to find the facts necessary to decide the issues of fact or law, or is of the opinion that it would be unjust to decide the issues on the evidence before it: Fraser & Horn, *The Conduct of Civil Litigation in British Columbia* (1978) vol. 1, 579. *See also* Rule 42(3) which provides for issuance of a writ of possession to enforce an order for the recovery or delivery of possession of land. No leave is necessary to issue the writ: *MacMillan Bloedel Industries Ltd.* v. *Anderson*, (1982) 37 B.C.L.R. 192 (S.C.).

available. Because of the technical nature of the summary procedures under the *Commercial Tenancy Act*, proceeding under the *Rules of Court* may well be the preferred course of action for most landlords.

The summary procedures of the Act have been a dead letter for many years. The overlapping of the Rules and the Act renders the continued existence of most of the procedural sections of the Act not only superfluous but potentially confusing. The Act gives no hint that an action for possession can be brought under the *Rules of Court* without reference to the *Commercial Tenancy Act*.[50]

### 3. Multiplicity Of Proceedings

The court has no jurisdiction to hear an application under any of the summary provisions of the Act unless all procedural requirements have been satisfied.[51] Where an irregularity occurs, it cannot be corrected. The landlord must bring a new application. At the hearing of a summary application for possession, the court can only decide which party has the immediate right to the rented premises.[52] The tenant cannot raise an unrelated defence in the same proceeding.[53] Where complicated questions of fact or law arise, the parties must commence an ordinary action.[54] The court cannot refer an application under one of the summary procedure provisions to the trial list, or make any of the other orders usually available in Chambers.

The factors cited above all encourage a multiplicity of proceedings. This flies in the face of the policy enunciated in section 10 of the *Law and Equity Act*:[55]

> The court, in the exercise of its jurisdiction in any cause or matter before it, shall grant, either absolutely or on reasonable conditions that to it seem just, all remedies any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that,

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50. A casual reading of the Act might lead to a view that the statutory remedies are the only ones available to a landlord.

51. *See, e.g., 2733-4th Ave. Dev. Ltd.* v. *Xavier*, (1981) 33 B.C.L.R. 397 (Co. Ct.); *Burquitlam Co-op. Housing Assn.* v. *Romund*, (1976) 1 B.C.L.R. 229 (Co. Ct.); *Foreshore Projects Ltd.* v. *Warner Shelter Corp.*, *supra*, n. 39.

52. *See, e.g., McBain* v. *Herbert*, (1956) 19 W.W.R. 562 (Man. Q.B.), where it was held that the procedure under the equivalent of s. 28 did not empower the court to give summary judgment for unpaid rent.

53. *See, e.g., 238709 B.C. Ltd.* v. *McCallum Equity Corp.*, [1986] B.C.D. Civ. 2344-01 (Co. Ct.) where it was held that the tenant's defence alleging misrepresentation by the landlord did not relieve him from his duty to pay rent, and that therefore the landlord was technically entitled to an order of possession.

54. *See* the cases cited at n. 41, *supra*.

55. R.S.B.C. 1979, c. 224.

> as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of the matters avoided.

The application of those principles to landlord and tenant litigation requires that the court be able to grant relief based on a consideration of all relevant facts and dispose of all outstanding issues between the parties. The procedural sections of the *Commercial Tenancy Act* fall far short of that goal.

## E. Reform

### 1. Procedure

The analysis set out above leaves little doubt that the procedural sections of the *Commercial Tenancy Act* are in a sad state of repair. The main question we confront is whether any attempt should be made to devise a new set of procedural provisions that are more in tune with contemporary needs for inclusion in a new Act. Or should procedure be left entirely to the *Rules of Court*? To us, the answer seems clear.

It is our view that the *Rules of Court* already provide an entirely adequate procedural framework for the resolution of landlord and tenant disputes. Under the Rules, the bulk of commercial tenancy cases can, in all likelihood, be disposed of in summary proceedings. A full trial will be available where it is appropriate.

We believe that a new Act need go no further than to list possible orders the court may make in a commercial tenancy dispute. Such a provision is included in the draft legislation.[56] By implication, this leaves all procedural matters to be governed by the *Rules of Court*.

### 2. A Statutory Right Of Re-Entry

#### *(a) The Principle*

One justification for the procedural provisions of the *Commercial Tenancy Act* is the need to provide a remedy for the landlord whose rent is unpaid and who has not reserved, in the tenancy agreement, the right to repossess the premises in those cir-

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56. *See* s. 14 of the draft legislation in Chapter X.

cumstances. The tenant may abandon the premises or remain in possession without paying the rent.[57]

Possession of the premises on such a default is of obvious importance to the landlord. As a result, in practice, most written tenancy agreements expressly provide the landlord with a right to re-enter on non-payment of rent. This practice is, in fact, so pervasive that, arguably, the need to provide a statutory right to possession (as distinct from a remedy to enforce that right) has vanished.

On the other hand, one does occasionally hear of oral tenancies of commercial premises. By their nature they are unlikely to contemplate explicitly a right of re-entry. A similar concern arises with informally drawn tenancy agreements which are entered into without the assistance of a legal advisor. The landlord in this sort of arrangement commonly fails to appreciate that it is necessary to negotiate for, and include in the agreement, a right of re-entry.

On balance, we believe the *Commercial Tenancy Act* should continue to provide relief in the "informal lease" kind of situation. Rather than dealing with it as a procedural matter, however, it would be preferable to cast this relief in the form of a statutory proviso for re-entry. This would eliminate the only justification for retaining the procedural provisions of the present Act. While this would result in somewhat less judicial supervision in these cases, other remedies seem adequate to deal with potential abuse.[58]

*(b) Scope*

What should be the scope of the proposed statutory right of re-entry? The procedure under section 28 of the current Act provides a remedy for the tenant's breach of a material covenant of the tenancy agreement as well as for his non-payment of rent. Should the statutory proviso have the same scope as section 28? Or should it be narrower and confined to a failure to pay rent?

Two factors are worth noting on this question. First, no other province appears to have gone as far as section 28 in pro-

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57. These are the situations dealt with in s. 5 and in s. 28(a) respectively.
58. Any infraction of the tenant's rights can be dealt with by a subsequent action for damages or by granting him relief from forfeiture. *See* Chapter VII and s. 6 of the draft legislation.

viding a statutory right of re-entry.[59] Second, section 28 is rarely invoked to enforce a forfeiture for breach of a material covenant.[60]

It is our preliminary view that the statutory right of re-entry should not be available if the tenant breaches a material covenant of the tenancy agreement. The experience under section 28 suggests that such a provision is rarely necessary. We are also concerned that a right of self-help in situations involving a breach of the tenancy agreement (other than a failure to pay rent) might lend itself to abuse. The existence of arrears is a matter that is seldom in dispute, and the exercise of a statutory right of re-entry for non-payment of rent would not appear to require judicial supervision. But the tenant may have legitimate grounds to dispute the landlord's view that a different material provision of the tenancy agreement has been breached. We do not believe the *Commercial Tenancy Act* should, itself, provide a vehicle for landlord self-help in such cases.

This approach to the statutory right of re-entry does not, of course, interfere with the landlord's option to include in the tenancy agreement a right to re-enter for breach of a material covenant.

*(c) Duration of Breach*

How soon after the non-payment of rent should the landlord be able to re-enter the premises? The summary procedure under section 28 of the *Commercial Tenancy Act* can be invoked if the tenant fails to pay his rent within seven days of the time agreed on. On the other hand, if the procedure set out in section 5 is to be invoked, the rent must be a year in arrear. Clause 14 of the lease portion of the *Land Transfer Form Act*[61] provides for re-entry on non-payment of rent for 15 days. This is also the period chosen by most other provinces which have a statutory right of

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59. Rhodes, *supra*, n. 22, para. 13:9:11. In Manitoba, the landlord may re-enter if the tenant is convicted of keeping a disorderly house within the meaning of the *Criminal Code*: The *Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 17(2).

60. We have only found two reported cases involving an application for summary relief for breach of a material covenant. In *Powliuk* v. *Drinkwater*, [1956] 1 D.L.R. (2d) 338 (B.C. Co. Ct.) the court found the procedure for breach of a covenant under s. 28 to be "complicated and absurd." In *American Traders Co.* v. *Gemini Bootery Ltd.*, (1979) 19 B.C.L.R. 83 (Co. Ct.) the landlord's application was dismissed because tenant's noise did not constitute nuisance so as to forfeit the lease.

61. R.S.B.C. 1979, c. 221, Schedule 4. This is based on *The Leases Act, 1845*, 8 & 9 Vict., c. 124, Sched. 2, Col. 2, Form 11.

re-entry, although the range extends to two months and even half a year.[62]

It is our conclusion that the new legislation should entitle the landlord to re-enter after 15 days' non-payment of rent. This length of time appears to strike a reasonable balance between the interests of the landlord and the tenant. Our draft legislation reflects this view.[63]

62. *See The Landlord and Tenant Act*, R.S.M. 1970, c. L70, s. 17(1) (15 days); *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, s. 8 (15 days); *Landlord and Tenant Act*, R.S.P.E.I. 1974, c. L-7, s. 9 (15 days); *The Landlord and Tenant Act*, R.S.S. 1978, c. L-6, s. 9(1) (2 months); *The Judicature Act*, R.S.N. 1970, c. 187, s. 130 (half a year).

63. *See* s. 5 of the draft legislation in Chapter X.

## CHAPTER X PROPOSED LEGISLATION

### A. Introduction

In the first Chapter of this Report we indicated that a rigorous expression of our recommendations for reform would take the form of draft legislation which would be found in one of the final chapters of the Paper. In keeping with this approach, no attempt has been made, to this point, to express our conclusions and recommendations in other than fairly general terms. The function of this Chapter is to set out the draft legislation promised.

The legislation is divided into two Acts. The first is a new *Commercial Tenancy Act* which is intended to replace the current Act. The second is a "Tenancy Laws Amendment Act" designed to act as a repository for all those recommendations that contemplate additions to, or deletions from, enactments other than the *Commercial Tenancy Act*.

Explanatory notes are provided. We have attempted to identify the function of each provision, and cross-referenced to it the portion of the text in which the issues concerned are discussed. Where we have drawn on other enactments for policy or drafting, that is also noted.

We have, in the legislation, attempted to use consistent terminology to refer to the parties and their relationship. "Landlord," "tenant" and "tenancy agreement" have been adopted in preference to "lessor," "lessee," "lease" or "demise" or any of the more exotic variations of those terms. We believe the result is much cleaner, and more easily understood, legislation.

## B. A New *Commercial Tenancy Act*

### Draft *Commercial Tenancy Act*

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

### Interpretation

1. (1) In this Act

"court" means the Supreme Court;

In drafting this Act a simplified vocabulary has been adopted. "Landlord" and "tenant" are left undefined. Who is or is not one of those parties is left to the general law.

"premises" means land that is the subject matter of a tenancy agreement;

"Premises" is defined to mean land. "Land" is given an extended definition in the *Interpretation Act*:

> "land" includes any interest in land, including any right title or estate in it of any tenure with all buildings and houses...

The effect of this extended definition is that it applies to virtually any property that may be the subject of a tenancy arrangement.

"tenancy agreement" means an agreement that creates the relationship of landlord and tenant between parties to it.

"Tenancy agreement" is used throughout the Act in preference to "lease" and its derivatives.

(2) The interpretation section of the *Bankruptcy Act* (Canada) applies to section 13.

Section 13 of the Act concerns the legal position of the landlord and the trustee following the bankruptcy of the tenant. Section 1(2) permits the specialized vocabulary of the *Bankruptcy Act* to be used in section 13. This allows much greater economy and precision in its drafting.

## Application of Act

**2.** (1) This Act applies to a tenancy agreement respecting premises situated in the province.

The purpose of this section is to define the scope of the Act. The Act applies to a tenancy agreement for premises within British Columbia.

(2) Notwithstanding subsection (1), this Act does not apply to a tenancy agreement to which the *Residential Tenancy Act* applies, except to the extent that Act provides that this Act applies.

The nature or purpose of the tenant's occupancy of the premises must also be considered. If the occupancy is for residential purposes the Act does not apply. Tenancy agreements to which the *Residential Tenancy Act* applies are not subject to this Act. See Section 2 of that Act in Appendix B.

Section 46(1) of the *Residential Tenancy Act* provides that certain provisions of the current *Commercial Tenancy Act* apply. That position will be preserved by the closing words of subsection (2) although some consequential amendments will be required. See section 4 of the draft *Tenancy Laws Amendment Act*.

(3) The application of this Act may not be excluded, varied or limited by a tenancy agreement unless otherwise provided in this Act.

Subsection (3) sets out the basic rule that parties may not contract out of the provisions of the Act.

A number of provisions create exceptions to this basic rule. For example see sections 3(3)(b), 5(3), 9(3), 9(5), 11(6), 13(7).

## Creation of tenancy agreement

**3.** (1) Subject to Section 54 of the *Law and Equity Act*, no particular form is required for the valid creation of a tenancy agreement.

Subsection (1) confirms that no particular formalities are required to create a valid tenancy agreement. The enforceability of the agreement may, however, depend upon compliance with the "Statute of Frauds" section of the *Law and Equity Act*. See Chapter II and Appendix B.

(2) A landlord who enters into a tenancy agreement shall deliver an instrument creating it to the tenant in a form registrable under the *Land Title Act*.

A tenancy agreement that is valid and enforceable between the parties may not be enforceable against other persons unless further steps are taken. One such step is registration under the *Land Title Act*. In order to register under that Act, a document in a particular form is required. A duty to provide such a document is created by subsection (2). This provision simply carries forward the substance of section 5(2) of the *Property Law Act* and is drafted in similar terms.

(3) Subsection (2) does not apply where

(a) the tenancy agreement is for a term not exceeding 3 years and there is actual occupation under it, or

(b) the parties otherwise agree.

Subsection (3)(a) eliminates the duty under subsection (2) for a short-term tenancy agreement. Section 23(1)(d) of the *Land Title Act* provides that such a tenant's interest is enforceable against third parties without registration. Paragraph (b) eliminates the duty where the parties so agree.

These subsections are also made applicable to the *Residential Tenancy Act*. See section 4 of the draft *Tenancy Laws Amendment Act*.

(4) The doctrine of *interesse termini* is abolished.

The doctrine of *interesse termini* and the reasons for its abolition are described in Chapter II.

(5) Without limiting the generality of subsection (4), notwithstanding that a tenant does not take possession of premises, rights under a tenancy agreement are capable of taking effect from the date specified in the agreement to be the commencement of its term.

Subsection (5) provides a positive statement of the law consequent on the abolition of the doctrine. Its drafting generally follows section 48(3) of the *Residential Tenancy Act*.

## Application of contractual rules

**4. (1) The rules of contract respecting the effect which one party's breach of a provision of a contract has on a second party's**

**(a) right to relief, and**

**(b) obligation to perform,**

**apply to a tenancy agreement.**

This section makes certain principles of contract law applicable to tenancy agreements. See the discussion in Chapter III.

The drafting of subsections (1) to (3) generally parallels sections 49(1), 49(3) and 48(5) of the *Residential Tenancy Act*.

An exception to subsection (1) is found in section 10(1) which prohibits a tenant from withholding rent in response to a landlord's breach. An alternative remedy is provided.

**(2) Where a landlord or tenant breaches a material provision of the tenancy agreement, the other party may elect to treat the agreement as terminated, but the agreement is not terminated until the other party is advised of the election.**

The right of a landlord to treat the agreement as terminated is subject to the right of the tenant to seek relief from forfeiture. See section 6.

**(3) Where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement, the party entitled to claim damages has a duty to mitigate his losses.**

Subsection (3) sets out a general rule concerning mitigation of damages. A more specific rule applies where the landlord's claim is for future rent. See section 11(4).

**(4) The *Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements.**

The doctrine of frustration of contract is discussed in Chapter III. The *Frustrated Contract Act* is set out in Appendix B.

## Proviso for re-entry

**5.** (1) Every tenancy agreement is deemed to include a provision that if the rent is unpaid for 15 days after a date on which it ought to have been paid the landlord may re-enter and resume possession of the premises.

As explained in Chapter XI, the elaborate procedural provisions of the current Act are in part justified by the need to provide a remedy to the landlord whose rent is unpaid and who has not reserved, in the tenancy agreement, the right to repossess the premises in those circumstances.

(2) Upon a landlord exercising a right to re-enter and resume possession of premises under subsection (1), all rights of the tenant with respect to the premises are terminated.

Where the agreement contains a "proviso for re-entry on non-payment of rent" the landlord need not rely on those provisions. It is a rare agreement that does not, in fact, contain such a proviso.

The drafting strategy adopted in the draft Act is to imply a proviso for re-entry into every tenancy agreement where the parties have not included a proviso of their own. The parties are free to exclude the deemed proviso if they wish.

(3) Subsection (1) does not apply

(a) where the parties have agreed to exclude its application, or

(b) where the tenancy agreement provides for a right of the landlord to re-enter on non-payment of rent.

The tenant must remain in default for 15 days before the right of re-entry arises under subsection (1). This period is consistent with that in the analogous clause (14) of the lease portion of the *Land Transfer Form Act*.

The landlord's right to re-enter, whether under subsection (1) or a provision of the tenancy agreement, is subject to the tenant's right to seek relief from forfeiture. See section 6.

## Relief from forfeiture

**6.** A tenant has the right to seek relief from forfeiture under sections 21 and 22 of the *Law and Equity Act* irrespective of the character of the breach on which the forfeiture is based and notwithstanding

(a) the landlord's exercise of a right of re-entry or repossession under section 5(1) or of a similar right given by the tenancy agreement, or

(b) the landlord's election to treat the tenancy agreement as terminated under section 4(2).

The *Law and Equity Act* contains general provisions which allow tenants, among others, to seek relief from agreements or other circumstances that would otherwise work a forfeiture. These provisions are discussed in Chapter VII.

This section clarifies that the tenant's right to seek relief from forfeiture is unaffected by provisions of the Act that might otherwise be interpreted as diminishing it.

## Assignment

**7.** (1) Subject to section 13, a person who takes an assignment of the interest of a landlord or tenant has all the rights, and is subject to all the obligations, of the assignor arising under the tenancy agreement.

Subsection (1) states a wide and general rule that an assignment of the interest of a party to a tenancy agreement carries with it the various burdens and benefits arising under the agreement and attaching to that interest. The issue it addresses is discussed in Chapter IV.

It replaces provisions and enactments such as section 14 of the current Act and the *Grantees of Reversions Act, 1540* that deal with the effect of assignments of transfers in particular circumstances.

The exception for section 13 of this draft Act concerns the position of the trustee in bankruptcy.

(2) Subsection (1) applies to a right or obligation notwithstanding that it

(a) does not touch, concern or have reference to the premises,

(b) became enforceable before the assignment, or

(c) relates to something not in existence at the time the tenancy agreement was created.

The purpose of subsection (2) is to exclude expressly particular rules of law that impede the enforcement of rights and obligations by and against assignees.

(3) No assignor, by reason only of subsection (1), is relieved of liability for any breach of the tenancy agreement, whether occurring before or after the assignment.

Subsection (3) confirms that any right of action, accrued or potential, against the assignor is not displaced by subsection (1).

(4) Where the interest of a landlord has been assigned, the tenant may continue to pay rent to the assignor until he receives written notice that payment is to be made to the assignee.

Subsection (4) protects the tenant who, without knowledge of an assignment, continues to pay rent to the assignor.

(5) In this section "assignment" includes any disposition, whether consensual or by operation of law, but does not include

(a) the creation of a subtenancy agreement, or

(b) an assignment made to secure the payment or performance of an obligation, so long as the assignee has not asserted rights associated with an estate in the premises to enforce the security.

In subsection (5) "assignment" is given an extended meaning. The pivotal term is "disposition" which, itself, receives an extended meaning through the operation of sections 28(4) and 29 of the *Interpretation Act*.

The extended meaning is then cut back as described in clauses (a) and (b). The need for exceptions relating to subtenancies and security arrangements was raised by our correspondents.

## Subtenancy

**8.** (1) In this section and in sections 7(5), 9 and 15

Dealing with subtenancies and the particular issues they raise calls for a special vocabulary. The function of subsection (1) is to create such a vocabulary as an aid to comprehensible drafting.

"intermediate landlord" means the landlord under a subtenancy agreement,

"subtenancy agreement" means a tenancy agreement between a tenant and a landlord whose interest in the premises arises under a superior tenancy agreement,

Since two other provisions of the Act also refer to subtenancies, this definition section extends also to them.

"subtenant" means the tenant under a subtenancy agreement,

Subtenancies are discussed generally in Chapter IV.

"superior landlord" means a landlord under a superior tenancy agreement,

Note that the "superior landlord" need not be the holder of the title to the property. He may, himself, be a tenant or subtenant who is one, or several, steps removed from ownership of the legal title through a "string" of subtenancies.

"superior tenancy agreement" means a tenancy agreement in which the tenant is also an intermediate landlord under a subtenancy agreement respecting the same premises;

(2) Where a superior tenancy agreement is surrendered to, or otherwise becomes merged in the interest of, the superior landlord

The curious position of the subtenant when the superior tenancy becomes merged is explained in Chapter IV. Remedial legislation is required to regularize his position. The way in which his position should be defined depends on whether or not the intermediate landlord remains in the picture.

(a) if the superior tenancy agreement is renewed or replaced by another tenancy agreement between the superior landlord and the same intermediate landlord, any question as to the rights and obligations arising under any subtenancy agreement shall be resolved as if the surrender or merger had not occurred, or

If the merged tenancy is renewed or replaced, the subtenant's position should not be affected by that event. The function of paragraph (a) is to achieve this. It carries forward the policy and effect of section 8 of the current Act.

(b) if paragraph (a) does not apply, then any question as to the rights and obligations of a subtenant in relation to the superior landlord shall be resolved as if the subtenant were the tenant of the superior landlord and the subtenancy agreement was the tenancy agreement between them.

If the merged tenancy is not replaced, paragraph (b) applies. Its purpose is to create a deemed tenancy between the subtenant and the principal landlord, its terms and conditions being those of the subtenancy agreement. It carries forward the policy and effect of section 34 of the *Property Law Act*.

(3) Where a superior landlord has taken steps to enforce a right of re-entry or forfeiture under a superior tenancy agreement, the court, on the application of a subtenant, may order that all or part of the term of the superior tenancy agreement, in respect of all or part of the premises, be vested in the subtenant.

Chapter IV notes the unenviable position of the subtenant where the superior landlord asserts a right of re-entry or forfeiture vis-a-vis the intermediate landlord. It was proposed that the subtenant should be entitled to apply for relief in these circumstances.

Subsection (3) allows the subtenant to apply to court for an order which, essentially, allows him to replace the intermediate landlord as the tenant of the superior landlord.

(4) An order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances, including conditions as to

(a) the execution of any instrument,

(b) the payment of compensation, or

(c) the giving of security.

Subsection (4) gives the court flexibility in attaching terms and conditions to an order under subsection (3).

Subsections (3) and (4) are based on section 4 of the *Conveyancing and Law of Property Act, 1892* (U.K.).

## Landlord's rights on assignment

**9.** (1) A provision of a tenancy agreement which prohibits the assignment of the tenant's interest, or the creation of a subtenancy by the tenant, is void and unenforceable.

Provisions to the effect of subsections (1) and (2) were recommended in Chapter IV. The need for them is described there.

(2) A provision of a tenancy agreement that the tenant shall not assign his interest or create a subtenancy without the consent of the landlord is enforceable, but the tenancy agreement is also deemed to contain a provision that such consent shall not be unreasonably withheld.

(3) For the purposes of subsection (2), the parties may agree to the standards by which the reasonableness of the landlord's conduct in withholding consent is to be measured.

Subsection (3) provides for limited freedom of contract in this context.

(4) A landlord is, with respect to a transaction referred to in subsection (2), entitled to claim reimbursement of reasonable expenses arising out of

(a) a tenant's request for the landlord's consent to the transaction, and

(b) a change in possession of the premises resulting from the transaction,

but no other fee may be claimed by the landlord in connection with the consent or change in possession.

Subsection (4) clarifies the right of the landlord to claim reasonable expenses that may be incurred in processing an application by the tenant for consent and for any expenses arising out of a change of possession.

(5) Subject to subsection (6), a provision of a tenancy agreement may reserve to the landlord

(a) a right of first refusal, or similar right, with respect to an assignment of the tenancy or the creation of a subtenancy, or

(b) a right to terminate the tenancy rather than approve

(i) an assignment of the tenancy, or

(ii) the creation of a subtenancy which embraces substantially the whole of the tenant's interest.

Subsections (5) and (6) attempt to balance the legitimate interests of the parties where a tenancy agreement reserves to the landlord a right to cancel the tenancy rather than approve an assignment. Such a right is enforceable except in the specific circumstances described in subsection (6).

(6) A landlord may not exercise rights arising under a provision referred to in subsection (5) where

(a) the proposed assignment or subtenancy

(i) is consequential on or part of a *bona fide* restructuring or sale of the tenant's business, and

(ii) the withholding of the landlord's approval to it would be unreasonable under subsection (2), or

(b) the tenant elects to retain the premises if the assignment or subtenancy is not approved.

Subsection (6) defines the circumstances where the tenant's right to assign should be protected. A business restructuring might include an amalgamation of corporations or the incorporation of a business formerly carried on as a proprietorship.

(7) Where a landlord authorizes or ratifies an act of his tenant that is otherwise prohibited by the tenancy agreement, including consent to a transaction referred to in subsection (2), the authorization, ratification or consent extends only to the specific transaction or matter authorized or to the specific breach of the tenancy agreement and not to any other or subsequent transaction, matter or breach.

Subsection (7) carries forward, in substance, section 25 of the *Law and Equity Act*. Its purpose, to overrule the rule in *Dumpor's Case*, is explained in Chapter IV.

## Rent abatement or diversion

10. (1) Notwithstanding section 4(1), a tenant shall not refuse to pay rent by reason only of a breach by the landlord of a material provision of the tenancy agreement.

A decision to allow the rules of contract law respecting the interdependence of material covenants to apply to tenancy agreements (see section 4) raises a question whether the principle should extend to all aspects of the tenancy agreement.

Payments of rent pose a particular problem in this regard. The perceived fear is that the principle might be abused by the unscrupulous (or simply desperate) tenant who might seize on the most trivial (or imagined) breach by the landlord as an excuse to avoid paying rent.

The Commission's conclusion is that rent withholding should be prohibited but that the tenant should be given a statutory remedy.

Rent withholding is prohibited in subsection (1) and a new remedy is provided in subsections (3) and (4).

(2) Nothing in subsection (1) affects the right of a tenant

(a) to deduct from rent otherwise payable, an amount in respect of

(i) a judgment against the landlord for damages or compensation for a breach of the tenancy agreement, or

(ii) any obligation that arises independently of the landlord and tenant relationship, or

(b) to cease paying rent on electing to terminate the tenancy agreement under section 4(2).

Subsection (2) preserves a tenant's right to withhold rent where he has reduced his claim against the landlord to a judgment or his claim is unrelated to the tenancy and to cease paying rent where the tenancy has been properly terminated as a result of the landlord's breach.

(3) Where a landlord breaches a material provision of the tenancy agreement and the tenant does not wish to elect to terminate the agreement under section 4(2), then the tenant may apply to the court for an order that the rent payable under the tenancy agreement

(a) be abated

(i) by an amount equal to the diminution in value of the premises to the tenant owing to the breach, or

(ii) by an amount sufficient to compensate the tenant for expenses incurred in repairing the breach, or

(b) be diverted in whole or part to any person by or through whom the tenancy agreement can be restored to, and maintained in, good standing.

(4) An order under subsection (3) may be made subject to any conditions that are fair and equitable in the circumstances.

The statutory remedy is one first developed in the context of residential tenancies. It is an order that the rent abate or be diverted in a way which permits the landlord's breach to be remedied. Precisely what order is appropriate will depend on the character of the breach.

If the result of the breach is a lessening of the value of the premises to the tenant, the appropriate order may be a simple abatement of rent for the period during which the breach has that effect. This could be done under paragraph (a)(i) of subsection (3).

If the breach has resulted in the tenant doing work or spending money to do something that was properly the responsibility of the landlord, an order might be made that rent abate to the extent of the money spent or the value of work done. This could be done under paragraph (a)(ii) of subsection (3).

Where the breach is the failure of the landlord to ensure that a third party supply property or services, such as utilities, it may be proper that a portion of the rent be diverted directly to the third-party supplier. This could be done under paragraph (b) of subsection (3).

**Future rent**

**11.** (1) Where a tenant ceases to occupy premises and the circumstances are such that the landlord is entitled to exercise a right to re-enter and repossess the premises, then, except as permitted by this section, no claim, however framed or pleaded, shall lie for

(a) the value of rent not in arrear at the time occupation ceased,

(b) rent payable through the operation of an acceleration provision, or

(c) damages or other compensation determined with reference to rent not in arrear at the time occupation ceased.

This section implements the proposals made in Chapter V respecting the right of the landlord to claim future rent. Its aim is to provide a rational restatement of the law on this point to replace the considerable confusion and uncertainty left by the *Highway Properties* case and subsequent jurisprudence. Subsections (1) and (2) identify the circumstances in which the section applies.

Note that the application of subsection (1) does not turn on "abandonment," a word which suggests some element of voluntary conduct on the part of the tenant. Instead, the subsection applies when the "tenant ceases to occupy premises." This, when read in the light of subsection (2), is broad enough to cover the situation where the landlord resumes possession of the premises against the wishes of the tenant, perhaps under a "proviso for re-entry."

It is also broad enough to cover the situation where the landlord purports to affirm the tenancy agreement and does not take possession.

Subsection (1) stipulates that the statutory right to compensation provided in the section is the landlord's exclusive remedy for future rent (including accelerated rent).

Where subsection (1) applies the landlord has a statutory right, under subsection (3), to claim compensation for rent not yet accrued under the tenancy agreement.

(2) Subsection (1) applies whether or not the landlord

(a) exercises the right to re-enter and repossess the premises, or

(b) elects to affirm or to terminate the tenancy agreement.

(3) In the circumstances described in subsection (1) the landlord is entitled to compensation equivalent to the amount by which

(a) the total, calculated without reference to the operation of an acceleration provision, of

(i) the rent in arrear at the date of trial, and

(ii) the present value of rent payable after the date of trial

exceeds

(b) the total of

(i) to the extent that the premises have been re-rented, the present value of the rent paid or payable by the new tenant or tenants, and

(ii) the present value (if any) of any portion of the premises which has not been re-rented for any part of the remaining term of the tenancy.

Compensation would be based on a formula which involves the calculation of the value of arrears and future rent, from which is deducted the value of any rent paid or payable by a new tenant and the value of the tenancy to the extent it has not been re-rented. Where the premises have been re-rented for only part of the remainder of the term and only a portion of the premises have been re-rented, it may be appropriate to deduct in respect of both.

All amounts are calculated as present values to avoid overcompensating the landlord and overvaluing any deduction from his compensation.

The method of valuing the tenancy is left at large. This should permit the court to adopt whatever approach to this question seems to be appropriate on the facts of the individual case and the evidence before it.

(4) In the circumstances described in subsection (1), the landlord is under a duty to make reasonable efforts to re-rent the premises to a suitable tenant at a reasonable rent and where the landlord fails to do so the compensation to which he is entitled under subsection (3) is reduced to the extent that the failure contributed to the loss for which compensation is claimed.

Full compensation is conditional on the landlord having mitigated his potential losses through reasonable attempts to re-rent the premises. Whether or not he has done so is a question of fact.

(5) For the purposes of subsection (4), the making of reasonable efforts to re-rent the premises does not require a landlord to re-rent the premises in preference to other property.

Subsection (5) makes it clear that in mitigating his losses, the landlord need not attempt to re-rent the premises in preference to other, similar, property he may hold.

(6) Where the application of a provision of the tenancy agreement would limit the landlord's recovery from the tenant to an amount less than that determined in accordance with subsections (3) and (4), then the compensation recoverable under subsection (3) is limited to that lesser amount.

Subsection (6) addresses the situation where the parties may have contracted in the tenancy agreement for a lesser measure of compensation to the landlord than would be provided by general law or by subsection (3). Subsection (6) preserves the result agreed to by the parties.

## Overholding tenant

**12.** Where a tenant continues to occupy the premises after the tenancy has expired or been terminated in accordance with the tenancy agreement or this Act, the landlord may recover from the tenant

This provision replaces sections 15 and 16 of the current *Commercial Tenancy Act*. It does not carry forward the "double rent" penalty of those sections.

(a) compensation for use and occupation of the premises, and

The section confirms the right of the landlord to claim compensation from an overholding tenant.

(b) indemnity for any liability resulting from the landlord's inability to deliver vacant possession of the premises to a new tenant or a purchaser.

It also gives the landlord a right of indemnity in some circumstances. This is something the current Act does not do.

## Bankruptcy of tenant

**13.** (1) Where a tenant becomes a bankrupt, the trustee, notwithstanding a provision of the tenancy agreement, may retain possession of the premises until the earlier of

(a) 3 months from the date the trustee assumed his powers with respect to the tenant's estate, or

(b) the expiration of the tenancy

on the same terms and conditions as the tenant might have held the premises had he not become a bankrupt.

(2) Where a tenant becomes a bankrupt and the tenancy agreement does not provide that the tenancy is terminated by the bankruptcy, the trustee may transfer or dispose of the tenant's interest under the tenancy agreement for the unexpired term to as full an extent as could have been done by the tenant had he not become a bankrupt.

(3) A trustee of a bankrupt tenant may surrender possession of the premises to the landlord at any time.

(4) A surrender under subsection (3) constitutes a disclaimer of the tenancy agreement and terminates the liability of the trustee and the bankrupt's estate for the payment of rent accruing after the surrender.

Section 13 concerns the rights of the trustee on the bankruptcy of the tenant, a matter dealt with in section 32 of the current Act. This topic is discussed in Chapter VI.

With the exceptions noted below, section 13 carries forward the policies of the current provision. The drafting has been greatly simplified and much more liberal use has been made of the definitions in the federal *Bankruptcy Act* as permitted by section 1(2) of the draft Act.

This section does not purport to carry forward any of the current provisions which attempt to specify the landlord's priority in the bankruptcy or which concern distress.

Subsections (1) to (4) confirm the right of the trustee to take possession of the premises, dispose of the tenancy agreement where it has not terminated, and surrender the agreement and the premises to the landlord.

(5) Commencing from the date the trustee assumed his powers with respect to the tenant's estate, the trustee shall pay the landlord rent, calculated on the basis of the tenancy agreement and payable in accordance with its provisions, for the period during which the trustee has, or is entitled to, possession of the premises, whether that possession, or the right to possession, arises under the tenancy agreement or under subsection (1).

Subsections (5) and (6) deal with the trustee's financial responsibilities to the landlord with respect to his occupancy of the premises after the bankruptcy.

The trustee's obligation to pay rent is set out in subsection (5). It is framed to ensure that the liability runs only from the time of the trustee's appointment and does not date back to some earlier event. Under subsection (6) the trustee's liability for the first month's rent is limited by the value of the estate. For the second and succeeding months his liability is not so limited and if there are not sufficient assets in the bankrupt's estate he will be personally liable to the landlord.

(6) The trustee's liability under subsection (5) for the first month the trustee has, or is entitled to, possession shall not exceed the value of the bankrupt's property available for distribution; but the trustee is personally liable for rent in respect of the second and succeeding months.

(7) A provision of a tenancy agreement that prohibits the sale or liquidation of a bankrupt tenant's property on the premises may be enforced against the trustee.

Subsection (7) is new. The issue it addresses is discussed in Chapter VI.

## Remedies

**14.** (1) The court may, on application, make one or more of the following orders:

Instead of the elaborate procedural provisions of the current Act, this version goes no further than to set out in a single section a list of possible court orders. In some instances, this section will provide the authority for making the order. In other cases it reiterates authority to be found in other sections.

(a) an order that the landlord or the tenant recover

(i) possession of the premises,

(ii) damages or other relief resulting from a breach of the tenancy agreement or a breach of this Act;

(b) an order that the landlord recover

The subject matter of the section references are:

(i) arrears of rent,

(ii) compensation for use and occupation under section 12(a),

Section 12(a) -- overholding tenant

(iii) indemnity under section 12(b),

Section 12(b) -- overholding tenant

(iv) compensation under section 11(3);

Section 11(3) -- future rent

(c) an order

(i) declaring that the landlord's consent to an assignment or the creation of a subtenancy has been unreasonably withheld,

(ii) declaring that a tenancy has been validly terminated under section 4(2), — Section 4(2) -- breach of a material provision

(iii) for the diversion or abatement of rent under section 10, — Section 10 -- diversion or abatement of rent

(iv) for the relief of a subtenant under section 8(3), — Section 8(3) -- principal agreement forfeited.

(v) for the relief of a tenant under section 21 or section 22 of the *Law and Equity Act*. — *Law and Equity Act*, sections 21 and 22 -- relief from forfeiture.

(2) A party may apply by petition for the relief set out in subsection (1).

(3) Nothing in this section affects the jurisdiction of the Provincial Court to hear any claim, otherwise within its jurisdiction, for the payment of rent or damages.

## Transition

**15.** (1) Except as provided in subsection (2) or (3), this Act applies to tenancy agreements made before it comes into force.

(2) Sections 8(3) and 10(3) apply only where the breach or event which gives rise to a right to apply for relief occurs after this Act comes into force.

(3) Section 11 applies only where the tenant ceases to occupy the premises after this Act comes into force.

This section sets out the transition rules that will govern the application of the new legislation.

Since most provisions of the Act simply carry forward policies that are already in the current Act or are part of the general law, the basic transition rule is that the Act applies to all tenancy agreements, whenever created.

Exceptions to the basic transition rule are set out in subsections (2) and (3) which identify particular circumstances when the law has changed in a way that it would be unfair to have the new Act apply with full force to existing agreements.

## C. A *Tenancy Laws Amendment Act*

### *Law and Equity Act*

**1.** (1) The *Law and Equity Act*, R.S.B.C. 1979, c. 224, is amended in section 21.1(1)

(a) by striking out "or" at the end of paragraph (c),

(b) by adding "or" at the end of paragraph (d), and

(c) by adding the following as paragraph (e):

(e) a tenancy agreement to which the *Commercial Tenancy Act* applies,

(2) Sections 21.1(4), 23, 24 and 25 are repealed.

Section 1 sets out amendments to the *Law and Equity Act*. Subsection (1) amends section 21.1 which provides relief from acceleration provisions in mortgages and similar instruments. The amendment will give the court the same power to order relief from an acceleration of rent under a tenancy agreement as it has with respect to accelerated payments under a mortgage.

See Chapter V for a discussion of acceleration of rent. See Appendix B for the text of section 21.1 in its current form.

Sections 23 and 24, which are to be repealed, place certain unjustified limitations on the power of the court to relieve from forfeiture. They are discussed in Chapter VII. See Appendix B for the text of those provisions.

The repeal of section 21.1(4) is consequential on the repeal of section 24.

Section 25 is being replaced by section 9(7) of the draft *Commercial Tenancy Act*.

(3) The following section is added:

**Apportionment**

**XX.** (1) In this section "recurring entitlement" includes salary, annuity, rent or other amount payable periodically.

(2) For the purpose of ascertaining rights or obligations under a recurring entitlement at a time when the right to a particular payment has not fully matured, the entitlement shall be deemed to accrue from day to day and is apportionable in respect of time accordingly.

(3) Subsection (2) does not apply to a recurring entitlement if the agreement, instrument or authority under which it arises stipulates

(a) that no apportionment is to take place, or

(b) that a different apportionment rule is to apply.

The provision to be added by subsection (3) is meant to replace sections 10 to 13 of the current *Commercial Tenancy Act* which concern apportionment. Sections 10 and 11 concerned apportionment in particular circumstances and apply only in respect of tenancies. Sections 12 and 13 are of general application and never should have been located in the Act in the first place.

The draft provision is of general application, so it is to be located in the *Law and Equity Act*.

The provision generally follows the policy of the Ontario apportionment legislation in deeming that which is to be apportioned to accrue from day to day. The drafting has, however, been greatly simplified. In particular, the basic concept of a "recurring entitlement" has been adopted as the pivot of the section.

Apportionment is discussed in Chapter VIII.

*Property Law Act*

**2.** (1) Section 5(2) of the *Property Law Act*, R.S.B.C. 1979, c. 340, is repealed.

Both sections of the *Property Law Act* to be repealed are carried forward in the draft *Commercial Tenancy Act*.

Section 5(2) is carried forward as subsections (2) and (3) of section 3 of the draft Act. See Chapter II.

(2) Section 34 is repealed.

Section 34 is carried forward as 8(2)(b) of the draft Act. See Chapter IV.

*Rent Distress Act*

**3.** Section 2 of the *Rent Distress Act*, 198X, S.B.C. 198X, c. XX, is amended by adding the following subsection:

This provision is meant to replace and relocate sections 3 and 4 of the current *Commercial Tenancy Act*.

The Act which it would amend is the draft *Rent Distress Act* recommended in this Commission's 1981 Report on Distress for Rent. That draft has not yet been enacted into law. The current *Rent Distress Act* is amenable to a similar amendment.

(2A.) A right of distress may be exercised before or up to 6 months after the later of

(a) the tenant's interest in the rented premises has terminated, or

(b) the tenant has ceased to occupy the rented premises.

The amendment would remove certain artificial limitations that currently apply to the exercise of a right of distress. In particular, the provision would reverse the rule that the landlord cannot distrain for arrears of rent after he has terminated the tenancy.

This issue is discussed in Chapter VII.

**4.** Section 46(1) of the *Residential Tenancy Act*, S.B.C. 1984, c. 15, is amended by striking out "sections 11 to 13 and 32 of the *Commercial Tenancy Act* apply" and substituting "sections 3(2), 3(3) and 13 of the *Commercial Tenancy Act* apply".

Sections 11 to 13 of the current Act will be subsumed in the apportionment provisions being added to the *Law and Equity Act* by section 1. No specific reference to them will be necessary since they are of general application.

A second change is to stipulate that sections 3(2) and 3(3) apply to residential tenancies. This will preserve the duty of the landlord to deliver a registrable instrument in appropriate cases. This duty is currently imposed by section 5(2) of the *Property Law Act*.

The other change is consequent on a renumbering, from section 32 to 13, of the provision respecting the trustee in bankruptcy.

## CHAPTER XI

# CONCLUSION

### A. General

Given the form in which our recommendations have been expressed, it is unnecessary to attempt to provide a detailed summary of them. The draft legislation set out in the previous Chapter speaks for itself. We believe, however, it may be useful to restate some of the major themes which appear in that draft.

First, a new *Commercial Tenancy Act* would continue to have the character of remedial legislation. The principal source of law governing the landlord and tenant relationship would continue to be the common law and the agreement between the parties. The legislation would intervene only where the common law or unrestrained freedom respecting the provisions of a tenancy agreement leads to socially undesirable or unfair results.

Second, the legislation does not alter the fundamental legal character of a tenancy agreement as creating an estate -- a legal interest in land. The legislation does, however, recognize and reinforce the recent tendency in the case law to emphasize the contractual elements of a tenancy agreement and to rely more heavily on the concepts of contract law in resolving differences between the parties.

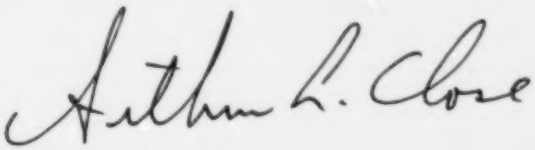
Third, a principal concern of the draft legislation is simply to carry forward concepts and rules that are part of the *Commercial Tenancy Act* and related legislation, but whose function and purpose has become obscured through archaic drafting and language. Many provisions of the draft legislation merely restate, in a modern way, the current statute law.

A different aspect of modernization is reflected in what does not appear in the draft legislation. Many provisions of the current *Commercial Tenancy Act*, whatever their original justification, have now outlived their usefulness. Such provisions have not been carried forward. An important example of this kind of provision are the procedural sections described in Chapter IX. Their omission permits the preparation of commercial tenancy legislation that is much more compact and comprehensible.

## B. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper which preceded this Report. Most of the submissions which we received were obviously the product of careful and thorough consideration and we profited greatly from them.

We also wish to acknowledge the important contribution made by a number of former members of the Commission's legal research staff. Deborah Cumberford, Monika Gehlen, Michael Doherty and Tim Delaney undertook research and writing on which portions of the Working Paper were based.



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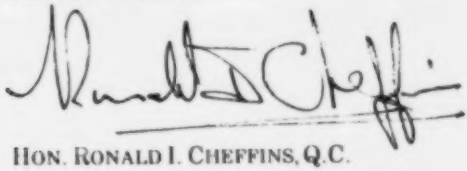

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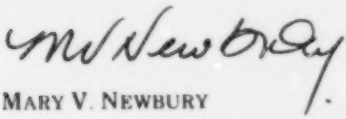

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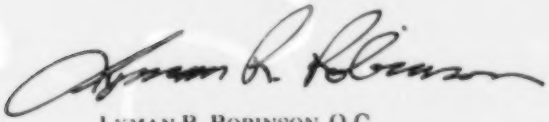

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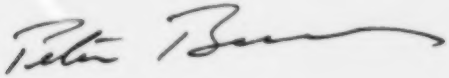

PETER T. BURNS, Q.C.

## APPENDIX A

### *COMMERCIAL TENANCY ACT*

**Payment by execution creditor of rent due, not exceeding one year's rent, before removal of chattels taken in execution**

1. No chattels being in or on any land which is or shall be leased for life or lives, term of years, or at will, or otherwise, are liable to be taken by virtue of any execution, unless the party at whose suit the said execution is sued out, before the removal of such chattels from the premises, by virtue of such execution or extent, pays to the landlord of the premises or his bailiff such sum of money as is due for rent for the premises at the time of the taking of the chattels by virtue of the execution, if the arrears of rent do not amount to more than one year's rent; and in case the said arrears exceed one year's rent, then the party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment, as he might have done heretofore; and the sheriff or other officer is empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money.

**Action against tenant for life for rent**

2. Any person having any rent in arrear or due on any lease or demise for life or lives may recover such arrears of rent by action as if such rent were due and reserved on a lease for years.

**Rent in arrear on a lease expired may be distrained for after determination of lease**

3. Any person having any rent in arrear or due on any lease for life or lives, or for years, or at will, ended or determined, may distrain for such arrears, after the determination of the said respective leases, in the same manner as he might have done if such lease or leases had not been ended or determined.

**Provided distress be made within 6 months after determination of lease**

4. Distress under section 3 shall be made within the space of 6 calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and during the possession of the tenant from whom the arrears became due.

**Provision for landlords where tenants desert premises**

5. And whereas landlords are often sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords might be satisfied for the rent-arrear, but also refusing to deliver up the possession of the demised premises, whereby the landlords are put to the expense and delay of recovering in ejectment: Be it enacted That if any tenant holding any land at a rack-rent, or where the rent reserved is full three-fourths of the yearly value of the demised premises, who is in arrear for one year's rent, deserts the demised premises and leaves the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent, it is lawful for 2 or more Justices of the Peace of the county, district or place, at the request of the landlord or his bailiff or agent, to go on and view the same, and to affix, or cause to be affixed on the most conspicuous part of the premises notice in writing what day (not less than 14 days thereafter) they will return to take a

second view thereof; and if on such second view the tenant, or some person on his behalf, does not appear, and pay the rent in arrear, or there is not sufficient distress on the premises, then the said justices may put the landlord into the possession of the said demised premises, and the lease thereof to such tenant, as to any demise therein contained only, shall from thenceforth become void.

**Tenants may appeal from justices**

**6.** Proceedings under section 5 are subject to review in a summary way by any judge of the Supreme Court, who may order restitution to be made to the tenant, together with his expenses and costs, to be paid by the landlord, or to make such order as he shall think fit; and in case the judge affirms the act of the justices, he may award such costs of appeal in favour of the landlord as may seem just.

**Method of recovering rentseck**

**7.** Every person shall and may have the like remedy by distress and by impounding and selling the same, in cases of rentseck, rents of assize, and chief rents, as in case of rents reserved on lease, any law or usage to the contrary notwithstanding.

**Chief leases may be renewed without surrendering all underleases**

**8.** (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord, the same new lease is, without a surrender of any of the underleases, as valid as if all the underleases derived from it had been likewise surrendered at or before the taking of such new lease.

(2) Every person in whom any estate for life or lives, or for years, is from time to time vested by virtue of the new lease, and his personal representatives, are entitled to the rents, covenants and duties, and shall have like remedy for recovery thereof, and underlessees shall hold and enjoy the land in the respective underleases comprised as if the original leases out of which the respective underleases are derived had been still kept on foot and continued.

(3) The chief landlord shall have and is entitled to such and the same remedy, by distress or entry in and on the land comprised in the underlease, for the rents and duties reserved by the new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as he would have had in case the former lease had been still continued, or as he would have had in case the respective underlease had been renewed under the new principal lease.

**Rents, how to be recovered where demises are not by deed**

**9.** (1) It is lawful for the landlord, where the agreement is not by deed, to recover by action in any court of competent jurisdiction a reasonable satisfaction for the land held, used or occupied by the defendant for the use and occupation thereof.

(2) If at the trial of the action it appears that any rent has been reserved by a parol, demise, or any agreement (not being by deed), such rent may be the measure of the damages to be recovered by the plaintiff.

**Rents recoverable from undertenant where tenants for life die before rent is payable**

10. Where any tenant for life dies before or on the day on which any rent was reserved or made payable on any demise or lease of any land which determined on the death of the tenant for life, the personal representatives of the tenant for life shall and may recover from any undertenant or undertenants of the land if the tenant for life dies on the day on which the same was made payable, the whole, or if before such day then a proportion, of the rent according to the time the tenant for life lived, of the last year or quarter of a year, or other time in which the rent was growing due as aforesaid, making all just allowances or a proportionable part thereof respectively.

**Certain other rents to be considered as within provisions of last section**

11. Rents reserved and made payable on any demise or lease of land determinable on the death of the person making the same (although such person was not strictly tenant for life thereof) or on the death of the life or lives for which the person was entitled to the land, shall, so far as respects the rents reserved by the lease, and the recovery of a proportion thereof by the person granting the same, his or her personal representatives, be considered as within the provisions of section 10.

**Apportionment and recovery of rents, annuities, and other payments coming due at fixed periods**

12. All rents-service hereafter reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power, and all rents-charge and other rents, annuities, pension, dividends, moduses, compositions, and all other payments of every description, made payable or coming due at fixed periods under any instrument that is hereafter executed, or (being a will or testamentary instrument) that comes into operation hereafter, shall be apportioned in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions, or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same are issuing or derived, or on the determination by any other means of the interest of any such person, he and his personal representatives, or assignees shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions, and other payments according to the time which has elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of the person or of the determination of his interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions, and other payments being made; and that every such person, his personal representatives, and assignees, shall have the same remedies for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions, and other payments, when the entire portion of which such apportioned parts form part becomes due and payable, and not before, as he or they would have had for recovering such entire rents, annuities, pensions, dividends, moduses, compositions, and other payments if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the land comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person who but for this section would have been

entitled to such entire rents; and such portions shall be recoverable in any action from such person by the party entitled to the same under this Act.

**Saving effect of express contracts**

**13.** Sections 11 and 12 do not apply to any case in which it is expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance.

**All grants and conveyances to be good, without attornment of tenants**

**14.** All grants and conveyances heretofore or hereafter made of any real estate or rents, or of the reversion or remainder of any land, are good and effectual without any attornment of any tenant of any such land out of which such rent shall be issuing, or of the particular tenants on whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made; but no such tenant shall be prejudiced or damaged by payment of any rent to any such grantor, or by breach of any condition for nonpayment of rent, before the notice is given to him of such grant by the grantee.

**Persons holding over land after expiration of lease to pay double yearly value**

**15.** In case any tenant for any term of life, lives, or years or other person who comes into possession of any land by, from, or under, or by collusion with the tenant, wilfully holds over any land after the determination of any such term, and after demand made and notice in writing given for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or reversion of such land belongs, or his agent thereunto lawfully authorized, then and in such case the person so holding over shall, for and during the time he holds over or keeps the person entitled out of possession of the land pay to the person kept out of possession, his personal representatives or assignees, at the rate of double the yearly value of the land so detained, for so long time as the same are detained, to be recovered in any court of competent jurisdiction.

**Tenants holding premises after time they notify for quitting them to pay double rent**

**16.** In case any tenant gives notice of his intention to quit the premises by him holden at a time mentioned in the notice, and does not deliver up possession thereof at such time, then the tenant or his personal representatives shall thenceforward pay to the landlord double the rent or sum which he shall otherwise have paid; to be levied and recovered at the same times and in the same manner as the single rent or sum before giving such notice could be levied or recovered; and such double rent or sum shall continue to be paid during all the time such tenant shall so continue in possession.

**Interpretation for purposes of ss. 18 to 31**

**17.** In sections 18 to 31

"landlord" includes the lessor, owner, the person giving or permitting the occupation of the premises in question, and the person entitled to possession, and his heirs, assignees and legal representatives;

"tenant" includes an occupant, a subtenant, undertenant, and his assignees and legal representatives.

**Landlord may apply to County Court**

**18.** (1) In case a tenant, after his lease or right of occupation, whether created in writing or verbally, has expired, or been determined, either by the landlord or by the tenant, by a notice to quit or notice under the lease or agreement, or has been determined by any other act whereby a tenancy or right of occupancy may be determined or put an end to, wrongfully refuses, on written demand, to go out of possession of the land leased to him, or which he has been permitted to occupy, his landlord may apply to the County Court in the territorial limits where the land lies

(a) setting out in an affidavit the terms of the lease or right of occupation, if verbal;

(b) annexing a copy of the instrument creating or containing the lease or right of occupation, if in writing;

(c) if a copy cannot be annexed by reason of it being mislaid, lost or destroyed, or of being in possession of the tenant, or from any other cause, then annexing a statement setting forth the terms of the lease or occupation, and the reason why a copy cannot be annexed;

(d) annexing a copy of the demand made for delivering possession, stating the refusal of the tenant to go out of possession, and the reasons given for his refusal, if any; and

(e) any explanation in regard to the refusal.

(2) This section extends and shall be construed to apply to tenancies from week to week, from month to month, from year to year, and tenancies at will, as well as to all other terms, tenancies, holdings or occupations.

**Court to appoint time and place of inquiry, etc.**

**19.** If after reading the affidavit it appears to the court that the tenant wrongfully holds and that the landlord is entitled to possession, the court shall appoint a time and place to inquire and determine whether the person complained of was a tenant of the complainant for a term or period which has expired, or has been determined by a notice to quit or otherwise, whether the tenant holds possession against the right of the landlord and whether the tenant has wrongfully refused to go out of possession, having no right to continue in possession.

**Notice in writing of inquiry**

**20.** (1) Notice in writing of the time and place appointed under section 19 shall be served by the landlord on the tenant or left at his residence or place of business at least 5 days before the day appointed, if not more than 32 km from the tenant's residence or place of business and one day in addition for every 32 km above the first 32, reckoning any broken number above the first 32 as 32 km.

(2) A copy of the affidavit on which the appointment was obtained, and of the papers attached to it shall be annexed to the notice.

**Court to issue writ of possession**

**21.** (1) If at the time and place appointed under section 19 the tenant, having been notified as provided, fails to appear, the court, if it appears to it that the tenant wrongfully holds, may order a writ to issue to the sheriff, commanding him to place the landlord in possession of the premises in question.

(2) If the tenant appears at the time and place, the court shall, in a summary manner, hear the parties, examine the matter, administer an oath or affirmation to the witnesses adduced by either party, and examine them.

(3) If after the hearing and examination it appears to the court that the case is clearly one coming under the true intent and meaning of section 18, and that the tenant wrongfully holds against the right of the landlord, then it shall order the issue of the writ under subsection (1) which may be in the words or to the effect of the form in the Schedule; otherwise it shall dismiss the case, and the proceedings shall form part of the records of the County Court.

**Removal of proceeding to Supreme Court**

**22.** Where a writ has been issued the Supreme Court may, on motion, within 3 months after the issue of the writ, command the County Court to send up the proceedings and evidence in the case to the Supreme Court, certified by the County Court, and may examine the proceedings, and if the Supreme Court finds cause may set it aside, and may, if necessary, order a writ to issue to the sheriff commanding him to restore the tenant to his possession in order that the question of right, if any appears, may be tried as in ordinary actions for the recovery of land.

**Costs**

**23.** The costs of all proceedings under this Act shall be according to the scale for the time being in force in the court where the proceedings are taken.

**Summoning of witnesses**

**24.** The County Court may have a person summoned as a witness to attend before it in any case, as witnesses are summoned in other cases in the County Court, and under the same penalties for nonattendance or refusing to answer in a case.

**Other rights and remedies of landlords not prejudiced**

**25.** Sections 18 to 24 do not prejudice or affect any other right or right of action or remedy which landlords may possess in any of the cases provided for.

**Style of cause**

**26.** The proceedings under sections 18 to 24 shall be entitled in the County Court of the county in which the land in question is situated, and shall be styled:

In the matter of [giving the name of the party complaining], landlord, against [giving the name of the party complained against], tenant.

**Service**

**27.** Service of all papers and proceedings under sections 18 to 24 shall be properly effected if made as required by law in respect of writs and other proceedings in actions for the recovery of land.

**Landlord may apply to registrar of County Court**

**28.** In case a tenant

(a) fails to pay his rent within 7 days of the time agreed on;or

(b) makes default in observing any covenant, term or condition of his tenancy, the default being of a character as to entitle the landlord to enter again or to determine the tenancy,

and wrongfully refuses or neglects, on demand made in writing, to pay the rent or to deliver the premises leased, which demand shall be served on the tenant or on some adult person on the land or, if vacant, be affixed to the dwelling or other building on the land, or on some portion of the fences, the landlord or his agent may apply to the registrar of the County Court within the territorial limits where the land is situate or partly situate, on affidavit

(c) setting forth the terms of the lease or occupancy;

(d) the amount of rent in arrears, and the time for which it is in arrears;

(e) producing the demand made for the payment of rent or delivery of the possession, and stating the refusal of the tenant to pay the rent or to deliver up possession, and the answer of the tenant, if an answer was made; and

(f) setting forth that the tenant has no right to set off or the reason for withholding possession, or setting forth the covenant, term or condition in performance of which default has been made, and the particulars of the forfeiture;

and on filing of the affidavit, the registrar shall issue a summons calling on the tenant, 3 days after service, to show cause why an order should not be made for delivering up possession of the premises to the landlord, and the summons shall be served in the same manner as the demand.

**Procedure on hearing and on enforcement of order for possession**

**29.** (1) Subject to subsection (3), on return of the summons, the court shall, if the tenant appears, hear the parties on the evidence they may adduce on oath, and if the tenant, having been served as provided, does not appear, proceed in his absence and make an order, either to confirm the tenant in possession or to deliver possession to the landlord, as the facts of the case warrant.

(2) In case an order is made for the tenant to deliver possession, and he refuses, then the sheriff shall, with assistance as required, proceed under the order to eject and remove the tenant, together with his goods.

(3) If a tenant, in case the default is for nonpayment of rent, before enforcement of the order, pays the arrears and all costs, the proceedings shall be stayed and the tenant may continue in possession of his former tenancy.

(4) If the premises are vacant, or the tenant is not in possession, or if in possession and he refuses, on demand made in the presence of a witness, to admit the sheriff, the latter, after a reasonable time has been allowed to the tenant or person in possession to comply with the demand for admittance, may force open any door in order to gain entrance, eject the tenant or occupant and give proper possession to the landlord or his agent.

**Costs**

**30.** The court may award costs which may be added to the costs of the levy for rent.

**Form of summons and order**

**31.** The summons to be issued and the order required for possession may be in forms as provided by the Rules of Court.

**Application of Bankruptcy Act and rights of trustee and landlord**

**32.** (1) In construing any word or expression occurring in this section, reference may be had to the interpretation section of the *Bankruptcy Act* (Canada).

(2) Where a receiving order or an assignment is made against or by a lessee under the Bankruptcy Act (Canada), the custodian or trustee, notwithstanding a condition, covenant or agreement in a lease, has the right to hold and retain the leased premises for a period not exceeding 3 months from the date of the receiving order or assignment, or until the expiration of the tenancy, whichever happens first, on the same terms and conditions as the lessee might have held the premises had no receiving order or assignment been made.

(3) If the lessee is a tenant of premises the tenancy of which is not determined by the making of a receiving order or assignment, the custodian or trustee may surrender possession at any time, and the tenancy shall terminate, but nothing shall prevent the trustee from transferring or disposing of a lease or leasehold property, or an interest of the lessee, for the unexpired term to as full an extent as could have been done by the lessee had the receiving order or assignment not been made. If the lease contains a covenant, condition or agreement that the lessee or his assignees should not assign or sublet the premises without the leave or consent of the landlord or other person, the covenant, condition or agreement shall be of no effect in case of such a transfer or disposition of the lease or leasehold property if the Supreme Court, on the application of the trustee and after notice of the application to the landlord, approves the transfer or disposition proposed to be made of the lease or leasehold property. Before the person to whom the lease or leasehold property is transferred or disposed of is permitted to go into occupation, he shall deposit with the landlord a sum equal to 3 months' rent, or supply to him a guarantee bond approved by the court in a sum equal to 3 months' rent, as security to the landlord that the person will observe and perform the terms of the lease, but the amount deposited or secured to the landlord shall not exceed the rent for the term assigned or sublet.

(4) The custodian or trustee has the further right, at any time before surrendering possession, to disclaim any lease, and his entry into possession of the leased premises and their occupation by him while required for the purposes of the trust estate shall not be evidence of an intention on his part to elect to retain the premises, nor affect his right to disclaim or to surrender possession under this section. If after occupation of the leased premises he elects to retain them and after assigns the lease to a person approved by the court as by subsection (3) provided, the liability of the trustee and of the estate of the debtor is, subject to the provisions of subsection (5), limited to the payment of rent for the period of time during which the custodian or trustee remains in possession of the leased premises for the purposes of the trust estate.

(5) The landlord has a preferred claim against the estate of the lessee for arrears of rent not exceeding 3 months' rent accrued due prior to the date of the receiving order or assignment, together with all costs of distress properly made before the date in respect of the rent hereby made a preferred claim.

(6) The landlord may prove as a general creditor for

(a) all surplus rent accrued due at the date of the receiving order or assignment; and

(b) any accelerated rent to which he may be entitled under his lease, not exceeding an amount equal to 3 months' rent.

(7) Except as aforesaid, the landlord is not entitled to prove as a creditor for rent for any portion of the unexpired term of his lease, but the trustee shall pay to the landlord for the period during which he or the custodian actually occupies the premises from and after the date of the receiving order or

assignment a rental calculated on the basis of the lease and payable in accordance with its terms, except that any payment already made to the landlord as rent in advance in respect of that period, and any payment to be made to the landlord in respect of accelerated rent, shall be credited against the amount payable by the trustee for that period.

(8) The landlord is not entitled to distrain the goods of the lessee after the date of the receiving order or assignment, and all goods distrained before that date shall on demand be delivered by the person holding them to the custodian or trustee.

(9) Nothing in this section shall render the trustee personally liable beyond the assets of the debtor in his hands.

**Frustration**

**33.** The *Frustrated Contract Act* and the doctrine of frustration of contract apply to leases.

SCHEDULE

FORM 1

Writ of Possession

The County Court of
To the Sheriff for .

The County Court of , by its order dated [month,day],19 , made under the *Commercial Tenancy Act*, on the complaint of against , ordered that was entitled to the possession of , in your county, and ordered that a writ should issue accordingly [if the tenant is ordered to pay costs, insert here the following: and also ordered and directed that should pay the costs of the proceedings under the Act, taxed by the court at $ ]:

Therefore, we command that, without delay, you cause to have possession of the land and premises.

[If the tenant is ordered to pay costs, insert here the following: And we also command that, out of the goods of in your county, you levy $ , being the costs taxed by the court and deposit that money in court immediately after carrying out this writ.]

And further that you promptly advise the court of the manner you carry out this writ, and bring this writ.

Witness , judge of the court at , on [month, day], 19 .

.....
Registrar

## APPENDIX A

FORM 2

Notice to Tenant

To [Name of tenant]

I hereby give you notice to deliver up possession of the premises [Identify the premises] which you hold of me as tenant, on . [month, day], 19

Dated [month, day], 19 .

.....

Landlord

FORM 3

Notice to Landlord

To [Name of landlord]

I hereby give you notice that I am giving up possession of the premises [Identify the premises] which I hold of you as tenant, on . [month, day], 19 .

Dated [month, day], 19 .

.....

Tenant

[**Note:** The jurisdiction which the *Commercial Tenancy Act* vests in the County Court will become vested in the Supreme Court of British Columbia when the *Supreme Court Act*, S.B.C. 1989, c. 40, ss. 32 - 38 come into force.]

## APPENDIX B

## SELECTED ENACTMENTS

### *LAW AND EQUITY ACT*

**Application of Act**

**1.** The rules of law enacted and declared by this Act are part of the law of the Province and shall be applied in all courts in the Province.

**Merger**

**13.** There shall not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

**Mortgagor may sue in respect of mortgaged land**

**14.** A mortgagor entitled for the time being to the possession or receipt of the rents and profits of land, as to which no notice of his intention to take possession or to enter into the receipt of those rents and profits has been given by the mortgagee, may sue for possession or for the recovery of the rents or profits, or to prevent or recover damages in respect of a trespass or other wrong relative thereto, in his own name only, unless the cause of action arises on a lease or other contract made by him jointly with any other person.

**Covenants to insure against fire**

**20.** The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

**Relief against penalties and forfeitures**

**21.** The court may relieve against all penalties and forfeitures, and in granting the relief impose any terms as to costs, expenses, damages, compensations and all other matters the court thinks fit.

**Relief against acceleration provisions**

**21.1** (1) Notwithstanding an agreement to the contrary, where by reason of a default in payment of any money due under, or in the observance of a covenant contained in

(a) a chattel mortgage as defined in the *Chattel Mortgage Act*,
(b) a conditional sale as defined in the *Sale of Goods on Condition Act*,
(c) a mortgage of land, or
(d) an agreement for sale of land,

the payment of money or the doing of anything is or may be required at an earlier time than would be the case if the default had not occurred, then, in a proceeding for the enforcement of rights under the instrument, the court may, before a final disposition of the proceeding, relieve any person from the consequence of the default.

(2) In granting relief under subsection (1), the court may impose any terms as to costs, expenses, damages, compensations and all other matters it considers appropriate.

(3) This section applies to an instrument referred to in subsection (1) (a) to (d) made before or after the coming into force of this section, and to proceedings commenced before or after the coming into force of this section.

(4) Section 24 does not apply in an application for relief under this section.

**Relief against forfeiture for breach of covenant to insure**

**22.** The court or any judge of it may relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened and the breach has, in the opinion of the court, been committed through accident, mistake or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court or judge in conformity with the covenant to insure, on terms the court or judge may think fit.

**Relief to be recorded**

**23.** The court or a judge of it, where relief is granted, shall direct a record of the relief having been granted to be made by endorsement on the lease or otherwise.

**Single relief on covenant**

**24.** The court or judge does not have power under this Act to relieve the same person more than once in respect of the same covenant or condition, nor does it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought has been already waived out of court in favour of the person seeking the relief.

**Restriction on effect of licence**

**25.** Where a licence to do an act which without that licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in a lease has at any time after March 25, 1881, been given or is given to any lessee or his assigns, the licence, unless otherwise expressed, extends only to the permission actually given, or to a specific breach of a proviso or covenant made or to be made, or to the actual assignment, underlease or other matter specially authorized to be done, but not so as to prevent a proceeding for a subsequent breach, unless otherwise specified in the licence. All rights under covenants and powers of forfeiture and re-entry in the lease remain in full force and are available against a subsequent breach of covenant or condition, assignment, underlease or other matter not specially authorized or made unpunishable by the licence, in the same manner as if no licence had been given. The condition or right of re-entry is and remains in all respects as if the licence had not been given, except for the particular matter authorized to be done.

**Enforceability of contracts**

**54.** (1) In this section "disposition" does not include

(a) the creation, assignment or renunciation of an interest under a trust, or

(b) a testamentary disposition.

(2) This section does not apply to

(a) a contract to grant a lease of land for a term of 3 years or less,

(b) a grant of a lease of land for a term of 3 years or less, or

(c) a guarantee or indemnity arising by operation of law or imposed by statute.

(3) A contract respecting land or a disposition of land is not enforceable unless

(a) there is, in a writing signed by the party to be charged or by his agent, both an indication that it has been made and a reasonable indication of the subject matter,

(b) the party to be charged has done an act, or acquiesced in an act of the party alleging the contract or disposition, that indicates that a contract or disposition not inconsistent with that alleged has been made, or

(c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed his position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

(4) For the purposes of subsection (3) (b), an act of a party alleging a contract or disposition includes a payment or acceptance by him or on his behalf of a deposit or part payment of a purchase price.

(5) Where a court decides that an alleged gift or contract cannot be enforced, it may order either or both of

(a) restitution of a benefit received, and

(b) compensation for money spent in reliance on the gift or contract.

(6) A guarantee or indemnity is not enforceable unless

(a) it is evidenced by writing signed by, or by the agent of, the guarantor or indemnitor, or

(b) the alleged guarantor or indemnitor has done an act indicating that a guarantee or indemnity consistent with that alleged has been made.

(7) A writing can be sufficient for the purpose of this section even though a term is left out or is wrongly stated.

## *PROPERTY LAW ACT*

**Transferor to deliver registrable instrument**

**5.** (1) A person transferring land in fee simple shall deliver to the transferee a transfer registrable under the *Land Title Act*.

(2) A person who as landlord or intended landlord makes a lease or agreement for a lease, other than a lease or agreement for a term not exceeding 3 years where there is actual occupation under the lease or agreement, shall, unless the contrary is agreed in it, deliver an instrument creating the lease or agreement to the tenant or intended tenant in form registrable under the *Land Title Act*.

**Transfer of land by instrument**

**15.** (1) Land may be transferred in freehold only by an instrument expressed to transfer the land, but it is not necessary to use the word grant or any other term of art.

(2) A transfer of land may pass the possession or right to possession without actual entry.

(3) This section is subject to the *Land Title Act*.

**Execution of instrument without seal**

**16.** (1) Subject to subsection (2), every instrument purporting to transfer, charge or otherwise deal with land or to release or otherwise deal with a

charge, and every power of attorney under which the instrument is executed, may be executed without a seal.

(2) An instrument or power of attorney executed by a corporation, or an instrument executed by a corporate attorney on behalf of a corporation, is defectively executed under the *Land Title Act* unless executed under seal.

(3) This section applies notwithstanding any other Act.

[ **NOTE:** The *Land Title Amendment Act, 1989*, R.S.B.C. 1979, c. 69 (not yet in force) provides that section 16 be repealed and the following substituted:

**Execution without seal**

**16.** (1) An instrument purporting to transfer, charge or otherwise deal with land or to transfer, release or otherwise deal with a charge need not be executed under seal.

(2) The affixation of a corporate seal to an instrument has the same effect as if the instrument were executed by an individual without a seal unless the provisions of the instrument, by express words or by necessary implication, include an intent by the parties to it that the instrument is to take effect as a deed. ]

**Effect of merger on subleases**

**34.** (1) Where a reversion expectant on a lease is surrendered or merged, the interest which as against the lessee for the time being confers the next vested right to the land shall be deemed the reversion for the purposes of preserving the same incidents and obligations as would have affected the original reversion had it not been surrendered or merged.

(2) This section applies to surrenders or mergers effected before or after this Act comes into force.

## *RESIDENTIAL TENANCY ACT*

**Interpretation**

**1.** In this Act

"residential premises" means a dwelling unit used for residential purposes, and includes, without limiting the above,

(a) a mobile home,

(b) a mobile home pad,

(c) caretaker's premises, and

(d) employment premises,

but does not include premises, under a single lease, occupied for business purposes with a dwelling unit attached;

"residential property" means a building in which, and includes land on which, residential premises are situated;

"tenancy agreement" means an agreement, whether written or oral, express or implied, having a predetermined expiry date or not, between a landlord and tenant respecting possession of residential premises.

**Application of Act**

**2.** (1) Notwithstanding any other enactment or an agreement to the contrary, this Act applies to tenancy agreements, residential premises and residential property.

(2) Notwithstanding subsection (1), this Act does not apply to

(a) an occupation of land or premises that, at common law, would be considered a licence to occupy land,
(b) residential premises in respect of which a non-profit cooperative or society, as defined in the regulations, is the landlord and a member of the cooperative or society is the tenant,
(c) a tenancy agreement for a term exceeding 3 years where the landlord is the government or an agent of the government,
(d) a tenancy agreement for a term exceeding 20 years, or
(e) summer cottages, winter chalets or other similar recreational premises rented on a seasonal basis.

**Right to assign or sublet**

**12.** (1) A tenant may assign or sublet his interest in a tenancy agreement with the consent of the landlord.

(2) Where a tenancy agreement

(a) has a fixed term of 6 months or more, or
(b) is in respect of a mobile home pad in circumstances other than where the tenant is renting a mobile home and the mobile home pad under a single tenancy agreement,

the landlord shall not arbitrarily or unreasonably withhold his consent to assign or sublet the tenant's interest in the tenancy agreement.

(3) A landlord shall not receive any consideration, directly or indirectly, for giving his consent under this section.

**Application of other legislation**

**46.** (1) Unless inconsistent with this Act, sections 11 to 13 and 32 of the *Commercial Tenancy Act* apply to residential premises and tenancy agreements.

(2) The *Frustrated Contract Act* and the doctrine of frustration of contract apply to tenancy agreements.

(3) Section 4 of the *Lord's Day Act* (Canada) does not apply to a tenancy agreement.

(4) Subject to sections 36 and 37, where this Act conflicts with the *Statute of Frauds* or the *Land Title Act*, the *Statute of Frauds* or the *Land Title Act*, as the case may be, applies.

**Application of certain principles**

**48.** (1) Notwithstanding any other Act, the common law or an agreement to the contrary, a landlord shall not distrain for default in the payment of rent.

(2) Notwithstanding the common law or an agreement to the contrary, a landlord shall not seize personal property of a tenant in satisfaction of a claim or demand unless the seizure is made under an order of a court or the authority of an enactment.

(3) Notwithstanding that a tenant does not take possession of residential premises, rights under a tenancy agreement are capable of taking effect from the date specified in the tenancy agreement to be the commencement of the term of the tenancy agreement.

(4) A landlord or tenant who, being a party to a tenancy agreement, contravenes this Act is liable to compensate the other party to the tenancy agreement for loss suffered by him as a result of the contravention.

(5) Where a landlord or tenant becomes liable to the other for damages as a result of a breach of the tenancy agreement or this Act, the landlord or tenant entitled to claim damages has a duty to mitigate his damages.

(6) Without limiting subsection (5), where a tenant terminates a tenancy agreement or vacates or abandons residential premises, other than in accordance with this Act and the tenancy agreement, the landlord has a duty to again rent the residential premises at a reasonably economic rent.

(7) Where a landlord or tenant gives notice of termination in accordance with this Act and the tenant continues to occupy the residential premises after the date on which the notice is effective, the landlord may claim from the tenant compensation for the period the tenant continues to occupy the residential premises.

(8) Where a landlord is entitled to claim compensation under subsection (7) and a person brings proceedings against him to enforce a right to possess the residential premises being occupied by the tenant, the landlord may add the tenant as a third party to the proceedings.

(9) A person having rent in arrears or due on a lease or demise for life or lives may recover that arrears or rent as if the rent were due and received on a lease for years.

(10) The obligations of a landlord under sections 15 to 17 run with the land or reversion.

(11) Covenants touching and concerning the residential property run with the land or reversion whether or not the things are in existence at the time of the demise.

**Material terms**

**49.** (1) Subject to subsections (2) and (3) or to any other provision of this Act to the contrary, the common law rules respecting the effect of the breach of a material term by one party to a contract on the obligation to perform by the other party apply to a tenancy agreement.

(2) Except as otherwise provided in this Act, a tenant shall not refuse to pay rent by reason only of a breach by a landlord of a material term in a tenancy agreement.

(3) Where a landlord breaches a material term in a tenancy agreement, the tenant may elect to treat the tenancy agreement as terminated, but the agreement is not terminated until the tenant advises the landlord that he has so elected.

(4) A term, whether or not it is a material term, and a condition respecting residential premises or residential property contained in a tenancy agreement, is enforceable by or against a person in possession of, and a person having an interest in a reversion of, the residential premises.

(5) Subsection (4) does not affect the rights or liabilities of persons between whom, at common law, there is privity of contract or privity of estate.

## *LAND TRANSFER FORM ACT*

**Interpretation**

**1.** In this Act

"land" extends to all freehold tenements, whether corporeal or incorporeal, or any undivided part or share in it respectively;

"parties" includes any corporation or body collegiate, as well as an individual.

PART 2

**Effect of lease**

**5.** Where a lease of land made according to the form in Schedule 3, or any other lease of land expressed to be made under this Act, the Short form of

Leases Act or the Leaseholds Act or referring to any of them, contains any of the forms of words in column 1 of Schedule 4, and distinguished by any number in it, the lease has the same effect and is to be construed as if it contained the form of words in column 2 of Schedule 4, and distinguished by the same number as is annexed to the form of words used in that lease, but it is not necessary in the lease to insert that number.

**Lease to include all buildings**

**6.** Every lease under section 5, unless an exception is specially made in it, includes all buildings, yards,gardens, cellars, ancient and other lights, paths, passages, ways, waters, watercourses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances to the land.

**Validity of lease failing to take effect by this Part**

**7.** A lease or part of a lease which fails to take effect by this Part is nevertheless as valid and effectual, and binds the parties to it, as far as the rules of law and equity will permit, as if this Part had not been passed.

**Covenants not to assign or sublet**

**8.** (1) Unless an exception is specially made in the lease, all covenants not to assign or sublet without leave entered into by a lessee in a lease under this Part run with the land demised, and bind the heirs, executors, administrators and assigns of the lessee, whether mentioned in the lease or not.

(2) The proviso for re-entry contained in Schedule 4 applies when inserted in a lease to a breach of either an affirmative or negative covenant.

SCHEDULE 3

This Indenture, made [month, day], 19 , under the *Land Transfer Form Act*, Part 2, between [here insert the names of the parties and recitals, if any], witnesses that [lessor] does demise to [lessee], his executors, administrators and assigns, all, etc., [parcels], from [month, day], 19 , for the term of , yielding during the term the rent of [state the rent and mode of payment, also the covenants to be inserted].

In witness of which the parties have set their hands.

SCHEDULE 4

**Directions as to the Forms in This Schedule**

1. Parties who use any of the forms in the first column of this Schedule may substitute for the words "lessee" or "lessor" any name [or other designation] and in every case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Parties may fill up the blank spaces left in the forms 6 and 7 in the first column of this Schedule employed by them with any words or figures and the words or figures introduced shall be taken to be inserted in the corresponding blank spaces left in the corresponding forms in the second column.

4. Parties may introduce into or annex to any of the forms in the first column any express exceptions from or express qualifications, and the same exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

5. Where the premises demised shall be of freehold tenure, the covenants 1 to 13, inclusive, shall be taken to be made with, and the proviso 14 to apply to, the heirs and assigns of the lessor; and where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators and assigns.

6. Parties may introduce into any lease other or further covenants, powers and provisions agreed on between them.

| COLUMN 1 | COLUMN 2 |
|---|---|
| 1. That [lessee] covenants with [lessor] to pay rent; | 1. And the said lessee doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said lessor that he, the said lessee, his executors, administrators, and assigns, will, during the said term, pay unto the said lessor the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever; |
| 2. and to pay taxes; | 2. and also will pay all taxes, rates, duties, and assessments whatsoever, whether parochial, municipal, parliamentary, or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said lessor, on account thereof, except such taxes, rates, duties, and assessments which the lessee is by law exempted from; |
| 3. and to repair; | 3. and also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend, and keep the said demised premises, with the appurtenances, in good and substantial repair, and all fixtures, and things thereto belonging or which at any time during the said term shall be erected and made, when, where, and so often as need may be; |
| 4. and to keep up fences; | 4. and also will from time to time, during the said term, keep up the fences and walls of or belonging to the said premises, and make anew any parts thereof that may require to be new made, in a good and husbandlike manner, and at proper seasons of the year; |
| 5. and not to cut down timber; | 5. and also will not, at any time during the said term, hew, fell, cut down, or destroy, or cause or knowingly permit or suffer to be hewed, felled, cut down, or destroyed, without the consent in writing of the lessor, any timber or timber trees, except for necessary repairs or firewood, or for the purpose of clearance, as herein set forth; |
| 6. and to paint outside every year; | 6. and also that the said lessee, his executors, administrators, and assigns, will every year in the said term paint all the outside woodwork and ironwork belonging to the said premises with 2 coats of proper oil colours, in a workmanlike manner; |

7. and paint and paper every year;

7. and also that the said lessee, his executors, administrators, and assigns, will every year paint the inside wood, iron, and other works now or usually painted with 2 coats of proper oil colours, in a workmanlike manner; and also repaper, with a paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten, or colour such parts of the said premises as are now plastered;

8. and to insure from fire, in joint names of [lessor] and [lessee]; to show receipts; and to rebuild in case of fire.

8. and also that the said lessee, his executors, administrators, and assigns, will forthwith insure the said premises hereby demised to the full insurable value thereof, in some respectable insurance office, in the joint names of the said lessor, his executors, administrators, and assigns, and the said lessee, his executors, administrators, or assigns, and keep the same so insured during the said term; and will, upon the request of the said lessor or his agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sum of money which shall be recovered by the said lessee, his executors, administrators, or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire, as aforesaid.

9. And [lessor] may enter and view state of repair, and that [lessee] will repair according to notice.

9. And it is hereby agreed that it shall be lawful for the said lessor and his agents, at all reasonable times during the said term, to enter the said demised premises, or any of them, and to examine the condition thereof; and further, that all wants of reparation which upon such views shall be found, and for the amendment of which notice in writing shall be left at the premises, the said lessee, his executors, administrators, and assigns, will, within 3 calendar months next after every such notice, well and sufficiently repair and make good accordingly.

10. That [lessee] will not use premises as a shop.

10. And also that the said lessee, his executors, administrators, and assigns, will not convert, use, or occupy the said premises, or any part thereof, into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose, or otherwise than as a private dwelling house, without the consent in writing of the said lessor.

11. And will not assign without leave.

11. And also that the said lessee, his executors, administrators, or assigns, shall not, nor will, during the said term, assign, transfer, or set over, or otherwise, by any act or deed, procure the said premises, or any of them, or the term hereby granted, to be assigned, transferred, or set over, unto any person or persons whomsoever, without the consent in writing of the said lessor, his heirs, executors, administrators, or assigns, first had and obtained.

12. And will not sublet without leave.

12. And also that the said lessee, his executors, administrators, and assigns, shall not, nor will, during the said term, sublet the said premises hereby granted, or any part thereof, to any person or persons without the consent in writing of the said lessor, his heirs, executors, administrators, or assigns, first had and obtained.

13. And that he will leave premises in good repair.

13. And, further, that the said lessee, his executors, administrators, and assigns, will, at the expiration or other sooner determination of said term, peaceably surrender and yield up unto the said lessor, his heirs, executors, administrators, or assigns, the said premises hereby demised, with the appurtenances, together with all buildings, erections, and fixtures now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear and damage by fire only excepted.

14. Proviso for re-entry by the lessor on nonpayment of rent, or nonperformance of covenants.

14. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for 15 days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or nonperformance of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators, or assigns, then and in either of such cases it shall be lawful for the said lessor, his heirs, executors, administrators, or assigns, at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole, to re-enter, and the same to have again, repossess, and enjoy as of his or their former estate, anything herein contained to the contrary notwithstanding.

15. [Lessor] covenants with [lessee] for quiet enjoyment.

15. And the lessor doth hereby, for himself, his heirs, executors, administrators, and assigns, covenant with the said lessee, his executors, administrators, and assigns that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said lessor, his heirs, executors, administrators, or assigns, or any other person or persons lawfully claiming by, from, or under him, them, or any of them.

## APPENDIX B

### *FRUSTRATED CONTRACT ACT*

**Application**

**1.** (1) Subject to subsection (2), this Act applies to every contract

(a) from which the parties to it are discharged by reason of the application of the doctrine of frustration; or

(b) that is avoided under section 11 of the *Sale of Goods Act*.

(2) This Act does not apply to

(a) a charter party or a contract for the carriage of goods by sea, except a time charter party or a charter party by demise;

(b) a contract of insurance; or

(c) contracts entered into before May 3, 1974.

**Idem**

**2.** This Act applies to a contract referred to in section 1 (1) only to the extent that, on the true construction of that contract, it contains no provision for the consequences of frustration or avoidance.

**Crown bound**

**3.** The Crown and its agencies are bound by this Act.

**Act applicable to part of contract**

**4.** Where a part of any contract to which this Act applies is wholly performed

(a) before the parties are discharged; or

(b) except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract,

and that part may be severed from the remainder of the contract, that part shall, for this Act, be treated as a separate contract that has not been frustrated or avoided, and this Act, excepting this section, is applicable only to the remainder of the contract.

**Adjustment of rights and liabilities**

**5.** (1) Subject to section 6, every party to a contract to which this Act applies is entitled to restitution from the other party or parties to the contract for benefits created by his performance or part performance of the contract.

(2) Every party to a contract to which this Act applies is relieved from fulfilling obligations under the contract that were required to be performed prior to the frustration or avoidance but were not performed, except in so far as some other party to the contract has become entitled to damages for consequential loss as a result of the failure to fulfil those obligations.

(3) Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (1), that loss shall be apportioned equally between the party required to make restitution and the party to whom the restitution is required to be made.

(4) In this section a "benefit" means something done in the fulfilment of contractual obligations, whether or not the person for whose benefit it was done received the benefit.

**Exception**

**6.** (1) A person who has performed or partly performed a contractual obligation is not entitled to restitution under section 5 in respect of a loss in value, caused by the circumstances giving rise to the frustration or avoidance, of a benefit within the meaning of section 5, if there is

(a) a course of dealing between the parties to the contract;

(b) a custom or a common understanding in the trade, business or profession of the party so performing; or

(c) an implied term of the contract, to the effect that the party performing should bear the risk of the loss in value.

(2) The fact that the party performing the obligation has in respect of previous similar contracts between the parties effected insurance against the kind of event that caused the loss in value is evidence of a course of dealing under subsection (1).

(3) The fact that persons in the same trade, business, or profession as the party performing the obligations, on entering into similar contracts, generally effect insurance against the kind of event that caused the loss in value is evidence of a custom or common understanding under subsection (1).

**Calculation of restitution**

**7.** Where restitution is claimed for the performance or part performance of an obligation under the contract other than an obligation to pay money,

(a) in so far as the claim is based on expenditures incurred in performing the contract, the amount recoverable shall include only reasonable expenditures; and

(b) if performance consisted of or included delivery of property that could be and is returned to the performer within a reasonable time after the frustration or avoidance, the amount of the claim shall be reduced by the value of the property returned.

**Idem**

**8.** In determining the amount to which a party is entitled by way of restitution or apportionment under section 5, no account shall be taken of

(a) loss of profits; or

(b) insurance money that becomes payable

by reason of the circumstances that give rise to the frustration or avoidance, but account shall be taken of any benefits which remain in the hands of the party claiming restitution.

**Limitations**

**9.** (1) No action or proceeding under this Act shall be commenced after the period determined under subsection (2) of this section.

(2) For the purposes of subsection (1), a claim under this Act shall be a claim for a breach of the contract arising at the time of frustration or avoidance, and the limitation period applicable to that contract applies.

## APPENDIX C

### ORIGINS OF THE *COMMERCIAL TENANCY ACT*

| | |
|---|---|
| s. 1. | 8 Anne, c. 18 [14], s. 1. |
| s. 2. | 8 Anne, c. 18 [14], s. 4. |
| s. 3. | 8 Anne, c. 18 [14], s. 6. |
| s. 4. | 8 Anne, c. 18 [14], s. 7. |
| s. 5. | 11 Geo. 2, c. 19, s. 16. |
| s. 6. | 11 Geo. 2, c. 19, s. 17. |
| s. 7. | 4 Geo. 2, c. 28, s. 5. |
| s. 8. | 4 Geo. 2, c. 28, s. 6. |
| s. 9. | 11 Geo. 2, c. 19, s. 14. |
| s. 10. | 11 Geo. 2, c. 19, s. 15. |
| s. 11. | 4 & 5 Will. 4, c. 22, s. 1. |
| s. 12. | 4 & 5 Will. 4, c. 22, s. 3. |
| s. 13. | 4 & 5 Will. 4, c. 22, s. 3. |
| s. 14. | 4 Anne, c. 3 [16], ss. 9, 10 |
| s. 15. | 4 Geo. 2, c. 28, s. 1. |
| s. 16. | 11 Geo. 2, c. 19, s. 18. |

ss. 17 to 27.

Sections 17 to 27 were first enacted in their present form in the *Over-holding Tenants' Act*, S.B.C. 1895, c. 53, ss. 2 to 12. The wording of these sections appears to be based on the *Overholding Tenants Act*, S.O. 1868, c. 26, ss. 2 to 13, which in turn is based on Stat. of Upper Canada, 11th Parl., c. 1 (1834, 4 Will. 4), ss. 53, 54, 57, 58. Conceptually, all of these statutes appear to derive from a combination of the following 19th century English acts: *Small Tenements Recovery Act, 1838*, 1 & 2 Vict., c. 74, ss. 1 and 2; *Common Law Procedure Act, 1852*, 15 & 16 Vict., c. 76, ss. 213 and 218; *County Courts Act, 1856*, 19 & 20 Vict., c. 108, s. 50.

ss. 28 to 31.

Sections 28 to 31 were first enacted in their present form in the *Over-holding Tenants' Act*, S.B.C. 1895, c. 53, ss. 13 to 15. The wording of these sections appears to be based on *An Act respecting Distress for rent and interest upon Mortgages*, S.M. 1884 (47 Vict.), c. 27, ss. 2 and 3. Conceptually, the procedure in ss. 28 to 31 appears to have its origins in two English statutes: *Common Law Procedure Act, 1852*, 15 & 16 Vict., c. 76, ss. 210 to 212; *County Courts Act, 1856*, 19 & 20 Vict., c. 108, ss. 52 and 54.

s. 32.

*Landlord and Tenant Act Amendment Act, 1924*, S.B.C. 1924, c. 27, s. 2.

s. 33.

*Landlord and Tenant Act*, S.B.C. 1974, c. 45, s. 61(1)(e).

**Note**: The citations which appear in square brackets are to the Ruffhead edition of the statutes.

## APPENDIX D

### Extract From Bill C-17: *BANKRUPTCY ACT*

Parliament of Canada

First reading: January 31, 1984

**Disclaimer of Leases of Real Property**

**Rights of trustee**

**197.** (1) Notwithstanding any term in a lease or other agreement, where a bankruptcy order is made in respect of a lessee of real property, the trustee may,

(a) for the purpose of administering the estate of the lessee including the sale of the property of the estate, enter into possession of such real property for a period not exceeding the shorter of the unexpired term of the lease and three months from the date of bankruptcy;

(b) before a notice of intention to disclaim is given, elect, by notice in writing, to retain the leased property for all or any part of the unexpired term of the lease and any renewal thereof in accordance with the terms and conditions of the lease except as those terms and conditions may be modified by this section;

(c) before a notice of intention to disclaim is given,

(i) assign the lease on the same terms as to rent as those enjoyed by the lessee together with any rights of renewal to any person with the consent of the lessor,

(ii) agree to assign the lease on the same terms as to rent as those enjoyed by the lessee together with any rights of renewal without the consent of the lessor, subject to the approval of the court, to any person who undertakes to the lessor

(A) to observe and perform the terms of the lease, and

(B) not to conduct on the leased property a trade or business that is of a more objectionable or hazardous nature than that conducted thereon by the bankrupt or permitted by the lease; and

(d) where an agreement to assign a lease is entered into pursuant to subparagraph (c)(ii), occupy the leased property or permit the proposed assignee to occupy the leased property until the determination of the application to the court for the approval of the assignment of the lease.

**Application to court**

(2) The court, on application of the trustee, may approve a proposed assignment of lease under subparagraph (1)(c)(ii), if the trustee satisfies the court that

(a) the proposed assignee is a fit and proper person to be put into possession of the leased property; and

(b) the proposed use by the assignee is consistent with the terms of the lease or the previous use.

**Deemed disclaimer**

(3) Where the court, on an application under subsection (2), refuses to approve a proposed assignment of a lease, the trustee is deemed to have disclaimed the lease as of the date of the refusal unless the court otherwise orders.

**Order of court**

(4) Where the court, on application under subsection (2), refuses to approve a proposed assignment of a lease, the court may require the lessor to repay all or part of the occupation rent paid to the lessor by the trustee.

**Relief from forfeiture**

(5) Notwithstanding anything in a lease of real property, where the lease is terminated within thirty days prior to the day on which a petition in respect of the lessee is filed, on application, the court may grant relief from the forfeiture and reinstate the lease.

**Duties of trustee**

(6) Where a trustee elects to retain leased property pursuant to paragraph (1)(b) or the court, on an application under subsection (2), approves a proposed assignment of a lease, the trustee shall forthwith pay any arrears

(a) in rent;

(b) in payments in the nature of rent; and

(c) in taxes or other charges reserved in the lease for payment by the lessee.

**Assignment of lease after election by trustee to retain lease**

(7) Where a trustee elects to retain leased property pursuant to paragraph (1)(b), the court, on application of the trustee, may allow the trustee to assign the lease together with any rights of renewal to a person who undertakes to the lessor

(a) to observe and perform the terms of the lease, and

(b) not to conduct on the leased property a trade or business that is of a more objectionable or hazardous nature than that conducted thereon by the bankrupt or permitted by the lease,

if the trustee satisfies the court that

(c) the proposed assignee is a fit and proper person to be put into possesison of the leased property, and

(d) the proposed use by the assignee is consistent with the previous use or the terms of the lease.

**Termination of liability of trustee**

(8) When a lease is assigned in accordance with this section, any liability of the trustee or the estate under the lease ceases.

**Right to disclaim**

(9) Where the trustee does not elect to retain leased property pursuant to paragraph (1)(b), the trustee may, during the three months from the date of bankruptcy, by a notice in writing to the lessor, disclaim the leased property notwithstanding

(a) any endeavour by the trustee to assign the lease; or

(b) the entering into possession of, or the exercise of any act of ownership by, the trustee in relation to the leased property.

**Lessor may require trustee to elect**

(10) Where a trustee does not enter into possession of real property pursuant to paragraph (1)(a) and does not elect to retain it pursuant to paragraph (1)(b), the lessor, by giving the prescribed notice to the trustee,

may require the trustee to enter into possession of the property or elect to retain the leased property and, if the trustee does not do so within fifteen days after receipt of such notice, the trustee is deemed to have disclaimed the lease.

**Notice to sub-lessee or secured creditor**

(11) Where, pursuant to subsection (10), the trustee receives a notice from a lessor and does not intend to enter into possession of the property or to retain the property referred to in the notice, the trustee shall forthwith serve a copy of the notice on any sub-lessee and secured creditor together with a concise statement of the rights granted to the sub-lessee or creditor under this section and a statement indicating his intention.

**Election by sub-lessee or creditor**

(12) A sub-lessee or secured creditor who is served with a copy of a notice pursuant to subsection (11) may, within fifteen days after receipt of the notice, elect to stand in the same position with the lessor as if he were a direct lessee from the lessor but a sub-lessee or secured creditor who so elects is subject

(a) to the same obligations, except in respect of rent, as the lessee was subject to under the lease as of the date of bankruptcy; and

(b) in respect of rent, to pay to the lessor

(i) the same rent that the sub-lessee paid to the lessee, if such rent was greater than that payable by the lessee to the lessor, or

(ii) the same rent that the lessee paid to the lessor with respect to the premises leased by the sub-lessee, if that rent is greater than that payable by the sub-lessee to the lessee.

**Effective date of disclaimer**

(13) Where a lessee grants a sublease of, or security interest in, the property that he leases and subsequently a bankruptcy order is made in respect of him, the deemed disclaimer by the trustee referred to in subsection (10) does not take effect before the end of the fifteenth day after the sub-lessee or secured creditor received the notice pursuant to subsection (11).

**Occupation rent**

(14) Where a trustee enters into possession of real property pursuant to paragraph (1)(a),

(a) the estate is liable for occupation rent for the period from the date of bankruptcy to the date that the trustee disclaims the lease; and

(b) if the trustee does not give one months notice to the lessor of his intention to disclaim the lease, the estate is liable for occupation rent for one month from the date that the trustee disclaims the lease.

**Idem**

(15) Where the trustee agrees to assign a lease pursuant to subparagraph (1)(c)(ii), unless the court otherwise orders, the estate is liable for occupation rent for the period from the date of bankruptcy to the date of the determination of the application for approval by the court of the proposed assignment.

**Deductions from occupation rent**

(16) The liability of the estate for occupation rent shall be reduced by any amount

(a) paid as accelerated rent;
(b) of rent prepaid by the lessee; and
(c) on deposit with the lessor to secure the payment of rent.

**Personal liability of trustee**

(17) Where the amount realized by the trustee from the property of the bankrupt is insufficient to pay the liability of the estate for occupation rent, the trustee is personally liable for any difference between the amount realized and the occupation rent.

**Disclaimer where there is a sub-lessee or secured creditor**

(18) Where a lessee of real property had, before he became a bankrupt, sublet the whole or any part of the leased property or created a security interest in the leased property, the trustee shall serve a copy of a notice of disclaimer on each sub-lessee and secured creditor together with a concise statement of the rights granted to the sub-lessee or creditor under this section concurrently with service of the notice of disclaimer on the lessor.

**Election by sub-lessee or secured creditor**

(19) A sub-lessee or secured creditor who is served with a copy of a notice of disclaimer pursuant to subsection (18) may, within fifteen days after receipt of the notice, elect to stand in the same position with the lessor as if he were a direct lessee from the lessor but a sub-lessee or secured creditor who so elects is subject

(a) to the same obligations, except in respect of rent, as the lessee was subject to under the lease as of the date of bankruptcy; and
(b) in respect of rent, to pay to the lessor
    (i) the same rent that the sub-lessee paid to the lessee, if such rent was greater than that payable by the lessee to the lessor, or
    (ii) the same rent that the lessee paid to the lessor with respect to the premises leased by the sub-lessee, if that rent is greater than that payable by the sub-lessee to the lessee.

**Effective day of disclaimer**

(20) Where a lessee grants a sublease of, or a security interest in, the property that he leases and subsequently a bankruptcy order is made in respect of him, a notice of disclaimer of the lease by the trustee does not take effect before the end of the fifteenth day after the sub-lessee or secured creditor received the notice of disclaimer pursuant to subsection (18).

**Failure to elect by sub-lessee or mortgagee**

(21) Where a sub-lessee of, or a secured creditor having a security interest in, a leased property does not make an election pursuant to subsection (19), the sublease of, or security interest in, the leased property granted by the lessee terminates at the end of the fifteenth day after the sub-lessee or secured creditor received the notice of disclaimer pursuant to subsection (18).

**Effect of disclaimer**

(22) A disclaimer of a lease by the trustee operates to determine, as from the date of receipt of the notice of disclaimer, the rights, duties and liabilities of the lessee in respect of the lease disclaimed and, subject to paragraph (14)(b) and subsection (23), discharges the estate from liability in respect of the lease disclaimed.

**No claim for accelerated rent**

(23) Subject to subsection (24), a lessor shall not make a claim for accelerated rent or for damages arising out of a disclaimer of a lease by the trustee and may not assert a lien on property on the premises under lease for arrears of rent, accelerated rent or damages other than a valid perfected security interest given by the lessee to the lessor to secure payment of any amount the lessor is entitled to under subsection (24).

**Claim by lessor for damages**

(24) A lessor may, where the lease is disclaimed by the trustee, claim in addition to accrued arrears of rent the lesser of

(a) the amount of the rent for the remaining term of the lease; and

(b) three months rent under that lease; and

where the lessor does so, there shall be deducted from the claim

(c) the balance of any deposit given to the lessor by the lessee for any purpose;

(d) any amount received by the lessor as accelerated rent;

(e) any rent paid in advance by the lessee;

(f) the value of any security interest taken by or granted to the lessor in respect of rent or other moneys due under the lease; and

(g) any occupation rent paid by the trustee.

**Definitions**

(25) In this section,

"lessor" includes a landlord and "lessee" includes a tenant;

"rent" means regular and periodic money obligations reserved in the lease for payment by the lessee.